

TRANSCRIPT OF RECORD

Supreme Court of the United States
OCTOBER TERM, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION
COMMISSION ET AL., PETITIONERS,

vs.

CONTINENTAL AIR LINES, INC.

No. 492

MARLON D. GREEN, PETITIONER,

vs.

CONTINENTAL AIR LINES, INC.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF COLORADO

NO. 492 PETITION FOR CERTIORARI FILED APRIL 30, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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**BEFORE THE
COLORADO ANTI-DISCRIMINATION COMMISSION**

655 Broadway
Denver 3, Colorado
No. 25

MARLON D. GREEN, Complainant,

vs.

CONTINENTAL AIRLINES, INC., Respondent.

COMPLAINT

For complaint against the Respondent above named, Complainant alleges:

1. That Respondent, Continental Airlines, Inc., a private employer, whose address is Stapleton Airfield, Denver, Colorado, and who is engaged in the business of operating a commercial airline, has violated the Colorado Anti-Discrimination Act of 1957 in the following respects:

2. That on or about July 8, 1957, Respondent refused to employ Complainant as a commercial airline pilot because he is a Negro.

3. That Respondent failed to advise Complainant as to the action taken on his application for employment within the ten-day period of time between June 26, 1957, the completion date of interviews and flight tests, and July 5, 1957, as promised.

4. That Respondent's Application for Employment form contains at least two specifications prohibited by the Colorado Anti-Discrimination Act of 1957, viz., attachment of photograph and applicant's race.

Wherefore, the Complainant requests the Colorado Anti-Discrimination Commission to use whatever powers are at

its command to eliminate the foregoing alleged discriminatory or unfair employment practices; and for such other and further relief as may be within the Commission's jurisdiction.

Complainant's address: 913 Nipp Street, Lansing, Michigan.

Marlon D. Green, Complainant.

Subscribed and sworn to before me this 13th day of Aug. 1957, by Marlon D. Green.

My Commission expires March 8, 1958.

H. Marie Brower, Notary Public, Ingham County,
Mich. My Commission Expires March 8, 1958.

[fol. 166]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

Complaint No. 25

In the Matter of MARLON D. GREEN, Complainant,

vs.

CONTINENTAL AIR LINES, INC., Respondent.

ORDER—March 28, 1958

Whereas, The Coordinator of the Colorado Anti-Discrimination Commission, as the investigating official for said Commission, has determined that probable cause exists for crediting the allegations of said Complaint, a verified copy of which is attached hereto,

Whereas, The Colorado Anti-Discrimination Commission heretofore has directed the Coordinator of Fair Employment Practices to take steps to eliminate the discriminatory and unfair employment practices therein complained of by methods of conference, conciliation and persuasion, and,

Whereas, The Coordinator of Fair Employment Practices has endeavored to conclude said Complaint by informal methods of conference, conciliation and persuasion, and,

Whereas, The Coordinator, as the investigating official, has determined in his opinion that the circumstances did not warrant the issuance and service of a written notice requiring the Respondent to answer the charges of such Complaint in writing within ten days after the date of such notice under the provisions of Section 6 (5) of Chapter 176, CSL 1957, and,

Whereas, The Coordinator of Fair Employment Practices heretofore has reported to the Colorado Anti-Discrimination Commission that further endeavors at conference, conciliation and persuasion would prove futile.

Therefore, The Colorado Anti-Discrimination Commission finds that said Complaint should be docketed for hearing before the Commission sitting as Hearing Examiners.

It Is, Therefore, Ordered: That a hearing thereon be had before said Hearing Examiners at the office of the Commission, 655 Broadway Building, Suite 910, Denver, Colorado, on the 23rd day of April, A. D. 1958 at the hour of Ten a.m., pursuant to the provisions of Chapter 176, CSL 1957, and that said Respondent shall answer the charges of the Complaint either in person, with or without counsel, or by the filing of a written verified answer to the Complaint, and, that in the event of the failure of the Respondent to answer the Complaint at the hearing, the Commission may enter the default of the Respondent.

In Witness Whereof, The Colorado Anti-Discrimination Commission has caused these presents to be duly executed this 28th day of March, A. D. 1958.

Colorado Anti-Discrimination Commission, Edward Miller, Chairman, Mrs. Paul Budin, George Oliver Cory, Robert C. Keeler, Gene Manzanarez, George J. White, Commissioners, By: Roy M. Chapman, Coordinator of Fair Employment Practices.

[fol. 172]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

No. 25

[Title omitted]

ANSWER

Comes Now the above named Respondent and for its answer to the complaint herein states and shows the Commission as follows:

First Defense

1. Admits that it is a duly authorized and certificated commercial carrier by air and that it maintains an office at Stapleton Airfield, Denver, Colorado; denies that it has violated the Colorado Anti-Discrimination Act of 1957 as alleged in paragraph 1 of the complaint.

2. Denies the allegations of paragraphs 2 and 3 of the complaint.

3. Admits that its application for employment form provides a space for the attachment of a photograph of the applicant, as alleged in paragraph 4 of the complaint, but denies that the same is prohibited by the Colorado Anti-Discrimination Act of 1957.

4. Admits that its application for employment form formerly contained a space in which the applicant's race was to be indicated, as alleged in paragraph 4 of the complaint, [fol. 173] but states that its application for employment form presently in use does not and has not for many years contained a space for such information.

Second Defense

1. More specifically answering the allegation in paragraph 4 of the complaint that the provision in its application for employment form for the attachment of a photograph is prohibited by the Colorado Anti-Discrimination Act of 1957, Respondent alleges that such provision is

neither intended to nor does in fact express any limitation, specification, or discrimination as to race, creed, color, national origin or ancestry but, on the contrary, is and has been used by Respondent for many years and is based upon a bona fide occupational qualification in that:

(a) Respondent's business involves the providing of services to the public; its employees are in frequent and close personal contact with its passengers; the physical appearance and attractiveness of its employees are important factors in the promotion and development of its sales, the confidence and attitude of its passengers, and the conduct of its business in competition with other commercial carriers by air;

(b) Respondent can and does employ in its flight operations only persons whose physical appearance and characteristics are attractive and pleasing and who are without physical disfiguration;

(c) Respondent expends substantial amounts of time and money transporting and interviewing applicants for employment and only by requesting a photograph of the applicant to be attached to its application form can Respondent avoid the time and expense, both to it and the applicant, of transporting and interviewing persons whose [fol. 174] physical appearance or characteristics alone would disqualify them for the position to be filled;

(d) The practice of requiring applicants for employment to submit photographs with their application form is customarily used and accepted, both by commercial carriers by air and businesses generally, and if Respondent is prohibited from following such customary usage and practice, it will be penalized and placed at a disadvantage as compared with other commercial carriers by air and businesses generally.

2. If the Colorado Anti-Discrimination Act of 1957 prohibits Respondent from requiring applicants for employment to submit a photograph with their application form, said Act, or such portions thereof as purport to authorize the prohibition complained of, deny to Respondent the equal protection of the laws and deprive it of its property with-

out due process of law in violation of Article XIV, Section 1 of the Constitution of the United States and of Article II, Section 25 of the Constitution of the State of Colorado, and by reason thereof are unconstitutional and void.

Third Defense

1. Respondent is engaged in the interstate transportation of passengers and freight by air by virtue of and subject to the laws, statutes and regulations of the United States applicable to interstate commercial carriers by air, including the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. §§401 et seq.) and the Railway Labor Act, as amended (45 U.S.C.A. §§151 et seq.).

2. By such laws, statutes and regulations the United States has pre-empted and reserved to its exclusive jurisdiction the regulation and control of interstate commercial [fol. 175] carriers by air pursuant to the provisions of Article I, Section 8 of the Constitution of the United States.

3. The provisions of the Colorado Anti-Discrimination Act of 1957, purporting to regulate and control Respondent in its operations as an interstate commercial carrier by air, are and constitute an undue burden on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States.

4. By reason thereof, the said Act is unconstitutional and void insofar as it purports to regulate and control Respondent's operations as an interstate commercial carrier by air.

Fourth Defense

Respondent moves the Commission for an order dismissing the complaint for lack of jurisdiction over the subject matter of this proceeding.

Wherefore, Respondent, having fully answered the complaint herein, prays that the same be dismissed.

Holland & Hart, By Patrick M. Westfeldt, William C. McClearn, Attorneys for Respondent, 520 Equitable Building, Denver 2, Colorado, AMherst 6-1461.

Address of Respondent: Stapleton Airfield, Denver, Colorado.

State of Colorado,
City and County of Denver, ss.

Harrold W. Bell, Jr., being first duly sworn, states that he is a Vice President of Continental Air Lines, Inc.; that he makes this verification for and on behalf of Continental Air Lines, Inc.; that he has read the foregoing Answer and knows that the contents thereof are true and correct.

Harrold W. Bell, Jr.

Subscribed and sworn to before me this 7th day of May, 1958.

Zaida Hogan, Notary Public.

My commission expires July 30, 1959.

[fol. 176]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

[Title omitted]

Transcript of Hearing—May 7 and 8, 1958

Pursuant to Notice to All Parties in Interest, the above-entitled matter came on for hearing before the Colorado Anti-Discrimination Committee, 655 Broadway Building, Denver, Colorado, on Wednesday, May 7, 1958.

Before: Edward Miller, Chairman, Mrs. Paul Budin, Commissioner, Robert Keeler, Commissioner, Gene Manza-
nares, Commissioner, George J. White, Commissioner.

APPEARANCES:

Wendell P. Sayers, Esq., Assistant Attorney General, appearing on behalf of the Complainant.

Patrick M. Westfeldt, Esq., and William C. McClearn, Esq., appearing on behalf of the Respondent.

[fol. 179]

PROCEEDING

COLLOQUY

Chairman Miller: Are the parties ready in the case of Marlon Green against Continental Air Lines?

Mr. Westfeldt: Yes, they are.

Mr. Sayers: The Complainant is ready.

Chairman Miller: The record should show the Complainant is represented by Wendell Sayers and the Respondent Continental Air Lines by—

Mr. Westfeldt: Patrick M. Westfeldt and William C. McClearn of Holland and Hart.

Chairman Miller: And the Commissioners present, Edward Miller, Chairman, Mr. White, Mr. Keeler, Mr. Manzanares and Mrs. Budin. The only one absent is Mr. Cory.

This matter comes up at this time on the complaint of Marlon D. Green, Complainant, against Continental Air Lines, Inc. The Complainant alleges:

CLERK'S NOTE

This complaint is the same as the complaint which appears at pages 1 and 2 of the record. It is accordingly omitted from the printed record at this point.

[fol. 180] May I ask, is this answer being submitted at this time?

Mr. Westfeldt: Yes, Mr. Chairman, it is.

Chairman Miller: The Answer of the Respondent sets forth as follows:

CLERK'S NOTE

This answer is the same as the answer which appears at pages 4-6 of the record. It is accordingly omitted from the printed record at this point.

[fol. 184] In other words, under the First Defense there are denials of the material allegations of the Complaint, the Second Defense relates to the questions of the validity of the requirement of the Act or the prohibition of the use of photographs in the application, the Third Defense relates to the jurisdiction of the Commission, as I understand it, and the Fourth is also a motion for lack of jurisdiction which I presume is based on the matters set up in the Third Defense, or are there other matters included in the Fourth Defense?

[fol. 185] Mr. Westfeldt: It is based on the matters set up in the Third Defense.

Chairman Miller: You raise constitutional questions. I assume that the Commission would have to proceed on the basis, first, that it has jurisdiction. I mean the question of jurisdiction would be fully argued later, but so far as this hearing is concerned, it would have jurisdiction to hear the allegations of the complaint and then in considering the whole matter, consider also the matter of the constitutionality of the Act, of the whole Act.

Mr. Westfeldt: Mr. Chairman, I think my position with respect to that is this, and actually Mr. McClearn and I would like to divide up our roles in this hearing and I would like to make to this Commission a statement of the position of Continental Air Lines on the subject of the constitutionality of the Act insofar as it purports to regulate an interstate carrier by air, and the jurisdiction of this Commission. I think as a matter of possible judicial review of the proceedings before this Commission these things must be asserted at this hearing.

Chairman Miller: I think it is quite proper.

Mr. Westfeldt: And I would like to ask leave, if I may, to go into the question of the constitutionality and jurisdiction of the Commission. I just as soon do it right now or at the end of the hearing.

Chairman Miller: How long do you think it would take [fol. 186] to cover the question of jurisdiction?

Mr. Westfeldt: Fifteen minutes.

Chairman Miller: Why don't you do it now? Is that agreeable? And as I understand it, Mr. McClearn, you are to cover the questions of fact?

Mr. McClearn: That is correct.

STATEMENT IN BEHALF OF RESPONDENT

Mr. Westfeldt: First of all, I would like to point out that the answer on file is a verified answer and I think it is clear from both of the pleadings on file in this case that the Respondent, Continental Air Lines, is an interstate carrier by air operating through many States in the United States, and as asserted in the Answer under Article I, Section 8 of the United States Constitution, the Congress of the United States has given the power to regulate interstate commerce and this power is supreme.

Now, it is supreme in relation to State laws that purport to regulate interstate commerce or actions in interstate commerce. With respect to interstate carriers by air, Congress has legislated very broadly and the two principal statutes of the United States that regulate interstate carriers by air are the Civil Aeronautics Act of 1938 and the Railway Labor Act, which was originally enacted only to cover railroads but by the 1938 amendment was extended to cover airlines, and because of the provisions of these two Acts we think an attempted extension of the Colorado [fol. 187] Anti-Discrimination Act to air carriers in interstate commerce is not constitutional and that Congressional legislation has completely occupied the field in this regard, and I think that these Acts have also occupied the field with respect to the matters of racial discrimination such as alleged in the Complaint.

Now, of course, it is the position of the Respondent, as set forth in the Complaint, that there wasn't any violation of the Colorado Act in any event, but I do think that it is important for the Commission to understand the argument of the Respondent, and that is that under the circumstances of the existing legislation the Colorado statute cannot be extended to interstate air carriers.

Now, first of all, the Railway Labor Act, which is in 45 U.S. Code 151 and many following sections. This is a very broad and comprehensive Act prescribing, among other things, the duties of carriers by air with respect to employees, and I will certainly admit that the Railway Labor Act does not contain a specific and detailed Fair Employment Practices Act such as is set forth in the Colorado statute under which this case is brought. But I would also like to point out that that Act doesn't contain any specific detailed provisions, for example, requiring labor unions to fully and fairly represent members of minority groups, and yet by judicial decisions the United States Supreme Court in two leading cases has said that under the Railway Labor Act there is a statutory duty, for example, on [fol. 188] labor unions not to discriminate for reasons of race, creed or color, and things of that nature. So that I think by the judicial decisions of the United States Supreme Court it is clear that the subject of racial discrimina-

tion at least applied to labor unions and it should be applied to employers on the same basis. The Railway Labor Act has been extended to cover those subjects.

Now, the specific cases, I am sure, Mr. Miller, you are familiar with and I don't know that the other members of the Commission are. The names of the cases are *Steele v. Louisville and Nashville Railway Company*, 323 U.S. 192 and 65 Supreme Court 226 which was decided in 1944, and in the facts of the case it was found that the defendant union had discriminated against Negro employees on the railroad. I think they were firemen. The Supreme Court held under that statute that the defendant union was given the exclusive right to bargain on behalf of the employees and that since it had derived its powers from the statute it had statutory duties.

I think the same thing applies with respect to an employer. It derives powers with respect to employer-employee relationships from the statute, therefore statutory duties should follow, and in essence the holding of the case was that the defendant labor union could not deny, restrict, destroy or discriminate against the rights of those for whom it legislates, which is also under an affirmative constitutional duty equally to protect those rights.

A companion case to that, which I won't go into in detail, which in essence holds the same thing, is the case of *Tunstall* against the *Brotherhood of Locomotive Firemen*, 323 U.S. 210, 65 Supreme Court 235, also decided in 1944.

Now, I think even more clear than the occupation of this field, the preemption of it, by the Congress of the United States Government are the provisions of the Civil Aeronautics Act of 1938, and I refer first of all to Section 484(b). It is 49 U.S.C.A. 484(b).

Now, I would like to point out to the Commission that the caption of this particular section of the Civil Aeronautics Act, at least as set forth in the United States Code Annotated, is entitled "*Rates for Carriage of Persons and Property*" which on its face wouldn't seem to apply to the matter of racial discrimination which is now before the Commission. Section (b) of that portion of the statute says "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage

to any particular person, port, locality or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Now, considering the language of that portion of the [fol. 190] statute, there has been judicial decision under that section of the statute, and the name of that case is *Ella Fitzgerald, et al., v. Pan American World Airways*, and the citation to it is 229 Federal Second at page 499, decided by the United States Court of Appeals for the Second Circuit in 1956.

In this action *Ella Fitzgerald*, a famous singer, brought a suit for damages against *Pan American Airways* for discriminating against her and some people who were traveling with her in air transportation on *Pan American*. Now, in the first instance the trial court dismissed the case for lack of jurisdiction, because there was no diversity of citizenship, but in reviewing the case the same section of the *Civil Aeronautics Act* that I just read to you was brought to the attention of the court and the court held that Section 484(b) is for the benefit of persons, including passengers using the facilities of air carriers, and it went on to hold that under this Federal Statute the plaintiff, *Miss Fitzgerald*, and others, had a right to bring a civil action for damages under the *Civil Aeronautics Act* as a result of the discrimination.

Now, there is one particular short paragraph in the opinion that I think should be called to your attention and it appears at Page 502 of 229 Federal Second, and the court says—

Chairman Miller: When was that decided?

Mr. Westfeldt: 1956, January 26.

Chairman Miller: I notice you have the advance sheets. [fol. 191] Mr. Westfeldt: No question it is in a bound volume now, I am sure.

The court said: "Although we regard it as not controlling, we note also the following: Congress sought uniformity in the practices of those subject to this Act. It is by no means clear that, in all States and territories, the com-

mon-law rules would render unlawful racial differentiations in accord with the 'separate but equal doctrine', whereas, in the light of recent Supreme Court decisions, we must construe Section 484(b) so that that doctrine will not apply." And in essence the court did hold that under this section of the Civil Aeronautics Act the racial discrimination complained of was an action arising under the law of the United States and the Federal jurisdiction.

Now, I think it is interesting to note that that case arose under this section 484(b) that I have just referred to, which I think the first time I read it, and I am sure the first time you take a look at it, too, you wouldn't see just apparently on its face that it covers this specific thing involved, but by judicial decision it does.

Chairman Miller: Has that been appealed to the Supreme Court?

Mr. Westfeldt: No, sir, it has not been appealed beyond the Second Circuit.

Now, there is still another provision of the Civil Aero- [fol. 192] nautics Act which is Section 402, and particularly paragraph (c) of that Section, and, incidentally, these section numbers that I am referring to are the section numbers that appear in Title 49 of U.S.C.A. rather than the section of the Act and the particular statute as enacted.

The Declaration of Policy of the Civil Aeronautics Act reads in part as follows: "In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity."

Now, skipping over to paragraph (c) since the others I don't think are applicable, one of these items that are in the public interest is "The promotion of Adequate, Economical, and Efficient Service by Air Carriers at Reasonable Charges, Without Unjust Discriminations, Undue Preferences or Advantages, or Unfair or Destructive Competitive Practices."

Now, I will submit to this Commission that the portion of 49 U.S.C.A., Section 402, that I have just read, is even broader than the Section 484(b) that I discussed a few minutes ago, and I would like to just add, in addition to

what I have pointed out to the Commission already, that even if the Congress hasn't treated specifically and in detail the matters of employment in relation to race, religion, and so on, in the airline industry, the States still are not [fol. 193] permitted to legislate in areas affecting interstate commerce where a lack of uniformity in matters of national concern would result.

Now, there is authority for this proposition, too, and the title of this case is Bethlehem Steel Company v. The New York State Labor Relations Board, 330 U.S. 767, 67 Supreme Court 1026, decided in 1947. Among other things in that case the court held, "It has long been the rule that exclusion of State action may be implied from the nature of the legislation and the subject matter, although the express declaration of such result is wanting."

Now, I think that that line of reasoning, coupled with the Fitzgerald Case, which pointed out that Congress sought uniformity in the practices of those subject to this Act, indicates this necessity of uniformity even in cases where State policy and Federal policy are in sympathy, and that that same identical State statute which moves into this area and which results in un-uniform regulation is unconstitutional, and a case in which such a statute was stricken down is the Wabash, St. Louis, and I think it is Peoria Railway Company against Illinois, 118 U.S. 557, 7 Supreme Court 4. I will admit that is an antique case. It was decided in 1886, but the court did say that the species of regulation involved were of a type "which must be, if established at all, of a general and national character and cannot be safely and wisely remitted to local rules and local regulations", and the language in other cases also [fol. 194] supports the same proposition, that the lack of uniformity resulting from State action cannot be permitted in matters affecting the national interest in the free flow of interstate commerce.

Now, just consider the Respondent, Continental Air Lines, for a minute, an interstate carrier by air, operating in many States. I don't know what the other States have. I would dare say that it could be very easily ascertained that maybe some of these States have a statute similar to the Colorado Statute, maybe they don't in Texas, maybe

they have ones that vary in language and vary in import so that the non-uniform burden that is placed on an interstate carrier by air, where it is operating in different States and hiring in different States, makes the carrier subject to many local rules that might vary and might be in conflict. I think the Commission would certainly admit right off the bat that if the matters complained of by Mr. Green in this proceeding had transpired in the State of Illinois or in the State of Texas or in the State of California, that this Commission would not have jurisdiction, and I think the fact that the Respondent operates in all of these States, that its employees, such as pilots and hostesses, mechanics and everything else have moved from State to State and things of that nature, that it is very easy to see the necessity for uniform regulations.

We think that the Federal Statutes cover the subject, we submit to this Commission that they do, and under [fol. 195] those circumstances where the Federal Government has occupied the field, why, the State law is inoperative and an attempt to extend it into this area is unconstitutional.

Chairman Miller: Let me ask you Mr. Westfeldt, is it your position that the Civil Aeronautics Act has preempted the entire field so that State legislation, whether consistent or inconsistent with the Federal Act, would be inapplicable?

Mr. Westfeldt: Both the Civil Aeronautics and the Railway have occupied the field to such an extent that the State law is inapplicable and an effort to extend the State law to a Respondent such as Continental under these circumstances is an unconstitutional application of the Act. I think that is perhaps the best way to state it. And I only want to mention one other thing on this business of preemption and occupation of the field. I want to refer the Commission also to another case entitled Guss v. Utah Relations Board, and it is at 353 U.S., page 1, and it is a recent case. I don't have the Supreme Court Reporter citation to it. I know it was decided within the last couple of years. This is an outstanding case of preemption of a field of law by the Federal Government. The statute in question was the Federal Labor Relations Act, the Taft-Hartley Act, or the National Labor Relations Act, as

amended. In that case the National Labor Relations Board declined to hear an unfair labor practice charge and they declined to hear the unfair labor practice charge because [fol. 196] the employer didn't meet the jurisdictional yardsticks established by the Board itself, and furthermore under Section 10(a) of the Taft-Hartley Act, the National Labor Relations Board had not ceded jurisdiction to the State Board, which it could do.

Now, the decision of the United States Supreme Court on this subject was, that notwithstanding the fact that the National Labor Relations Board wouldn't take the case and wouldn't hear the unfair labor practice charge because it had set up these jurisdictional yardsticks and therefore the claimant in the case had no recourse to that Board, that nevertheless because Federal legislation had occupied the field, the field was occupied exclusively, there had been no cession of jurisdiction to the State Board, and in effect the complaining party in the case had no remedy whatsoever. It was a No Man's Land. He couldn't go to the State Board because they didn't have jurisdiction, he couldn't go to the National Labor Relations Board because it hadn't elected to exercise the jurisdiction that it could act. Under these circumstances claimant was left without a remedy. The State Labor Board could not act under the Utah Labor Statute.

Now, this is just another example, and I am sure that you are familiar with the tremendous number of cases along this line in recent years, and it is under those circumstances and because these Federal Acts already cover it, and I don't think there is any No Man's Land here, that it is our position that for this Commission to act in this matter [fol. 197] and attempt to extend the Colorado Anti-Discrimination Act of 1957 to the case now pending against Respondent Continental Air Lines is beyond your jurisdiction, and I say that respectfully, and an attempt to do so and apply the Act in this way is unconstitutional. If the Act even purports to act in this way, the Act is unconstitutional in that respect.

Mr. White: May I ask you a question?

Mr. Westfeldt: Yes.

Mr. White: You quoted the Taft-Hartley law. Isn't there a clause in the Taft-Hartley law that where States have their own labor law, if that law is more restrictive than the Taft-Hartley law, then it will take precedence?

Mr. Westfeldt: That is under Section 14(d), I think, of the Act. I think there is a specific provision of that nature in the statute which, as I would express it to you, does cede jurisdiction to that extent to the State Labor Boards and State law.

There is another provision in the Taft-Hartley Act, Section 10(a) which specifically permits the NLRB in a specific area where State laws are compatible with the Federal law, they can also cede jurisdiction to a State Board. But this is a case where that is expressed in the statute and there is no such expression in the Civil Aeronautics Act or the Railway Labor Act that I know of. So I think that they are quite different in that regard.

[fol. 198] Mr. White: I want you to talk to me from now on so I can understand you.

Mr. Westfeldt: I will do my best.

Chairman Miller: Mr. Sayers? Excuse me, have you completed?

Mr. Westfeldt: Yes, I have, Mr. Chairman.

COLLOQUY

Mr. Sayers: Mr. Chairman, the question raised by the Respondent, of course, is a matter which I think will have to be finally settled in the courts. Receiving the answer just possibly ten minutes before this hearing, complainant certainly is not in position at this time to make answer to the statements made by Respondent. I feel, however, that this law of our State applies to those employment persons, persons employing who are residents of the State, who have their offices within the State, it would seem to me. I think this Commission certainly has a right under our Act to at least hear the evidence at this time which the Complainant has to offer, and I think perhaps the legal questions may have to be decided later. As I say, since I received this answer just possibly ten minutes before the hearing time, I am certainly not in position to discuss the matters raised by respondent.

Chairman Miller: I would suggest this. There are two constitutional questions, basically, I think that are raised. First, I think the actual constitutionality of the Colorado Anti-Discrimination Act itself is raised.

[fol. 199] Mr. Westfeldt: That is correct.

Chairman Miller: Which, of course, we would not pass on. I mean we assume that it is constitutional and valid. The other one is the question of jurisdiction, primarily, which you are raising, within the Commission upon the ground that the acts of the Respondent are solely within the jurisdiction of the Federal Government under the Civil Aeronautics Act and the Railway Labor Act. On that phase I would like to suggest that possibly you furnish us with a memorandum brief because I think we do not have the right, certainly, to pass on the question of whether or not we have jurisdiction. But I think we ought not to pass on that question now without briefs being submitted on both sides. That should not take too long, should it?

Mr. Westfeldt: No, Mr. Chairman. Do I understand that you would like such a memorandum brief devoted solely to the question of jurisdiction and not to the question of constitutionality?

Chairman Miller: No, I don't think this Commission would determine, however valuable your argument might be, that the Act is unconstitutional. I think that would be within the jurisdiction of the courts rather than this commission. But certainly this Commission can determine whether or not it has jurisdiction to hear certain matters.

Mr. Westfeldt: I would be glad to furnish a memorandum [fol. 200] on the subject of jurisdiction. I understand the Commission's position on that and I will furnish such a brief.

Chairman Miller: Is ten days too short?

Mr. Westfeldt: No, I can do it in ten days, I am sure. I particularly want the record to show that the question of both constitutionality and jurisdiction has been raised and asserted and made a part of this record so that it is available to the Respondent in the event of an appeal.

Chairman Miller: Yes, it is here in the first instance, that is correct. I think we ought to hear the evidence and then consider all the factors, both with respect to the mat-

ter of jurisdiction and the matters of fact. Any members of the Commission who feel otherwise?

Then if you will furnish a copy to Mr. Sayers.

Mr. Westfeldt: I certainly will.

Chairman Miller: And if you will furnish the Commission, too, with yours?

Mr. Sayers: Yes.

Mr. Westfeldt: Would these be simultaneous briefs that you have in mind?

Chairman Miller: No, what I had in mind was you furnishing a brief to Mr. Sayers.

Mr. Westfeldt: Then he would have ten days to reply?

Chairman Miller: Yes.

Mr. Sayers: I think so.

[fol. 201] Chairman Miller: The sooner the better.

Then we will proceed on the allegations of the Complaint. Is Mr. Green here?

STATEMENT IN BEHALF OF COMPLAINANT

Mr. Sayers: I have a statement first. Mr. Chairman and Members of the Commission, I thought perhaps it would be well to first make a short statement as to what we expect the evidence to show here.

As Commission Members, you are aware of the fact that the law says that there shall be no discrimination in hiring or in upgrading, and so forth, minority groups because they are Negroes. That is the gist of the matter. By Section 5(1) of Chapter 176 the law defines a discriminatory or unfair employment practice as follows:

Mr. Westfeldt: May we recess the hearing for a couple of minutes while Mr. McClearn takes this phone call?

Chairman Miller: Yes.

(Short recess taken.)

Chairman Miller: You may proceed.

Mr. Sayers: As we were about to say, Section 5(1) of our Anti-Discrimination Act defines a discriminatory and unfair employment practice as follows: "For an employer to refuse to hire or to discharge or to promote or demote or to discriminate in matters of compensation against any

person otherwise qualified because of race, creed, color, national origin or ancestry." Section 4 says it shall be discriminatory or an unfair employment practice for any employer to use any form of application for employment or to make any inquiry in connection with a prospective employment which expresses either directly or indirectly any limitation, specification or discrimination as to race, creed, color, national origin or ancestry, or intent to make any such limitation or discrimination unless based upon bona fide occupational qualifications as far as required by or given to an agency of the government for security reasons.

We feel, and we feel the evidence will show, that the complainant, Marlon D. Green, was discriminated against in that the application that was furnished him first required a photo, and second, it required the designation of race. We also feel that the evidence will show that Marlon Green was well qualified as a pilot. He was brought here from the East, given an interview but was not hired, and we think we can show he was not hired because he was a Negro. I think the Commission should answer the following questions as we present the evidence.

First, was Marlon D. Green refused employment because he is a Negro?

Second, did the application form filed by Mr. Green contain discriminatory specifications?

Third, did the Respondent make inquiries of Mr. Green expressing any limitation, specification or discrimination because of race, creed, color, national origin or ancestry? [fol. 203] Fourth, does Mr. Green possess the required qualifications for a commercial airline pilot?

Five. Was the Respondent justified in not hiring Mr. Green as a pilot?

If you find that they were justified in not hiring Mr. Green as a pilot, you will, of course, order the dismissal of the Complaint. If you find that Mr. Green was discriminated against, then you have the right to issue a cease and desist order.

I believe we are ready now to proceed.

Chairman Miller: Mr. McClearn, would you like to make a statement at this time?

Mr. McClearn: Would you like me to make a short statement at this time to express our position to the Commission?

Chairman Miller: All right.

STATEMENT IN BEHALF OF RESPONDENT

Mr. McClearn: I would first of all like to thank the Commission. This hearing was previously set for April 23 and at our request it was postponed until today because two of our operating people, Mr. Weiler and Mr. Hauter, were out of town. Actually, they were out of the country. They were in England and I am sorry to say they still are in England. We have not asked for a further continuance, but depending upon what matters are brought before you, it is possible that we may ask that the proceedings remain [fol. 204] open until we can obtain their testimony perhaps by way of deposition, but I do want to thank you for giving us the extension that we did ask for.

With respect to the allegations of the Complaint, we hope to present to you in some considerable detail the employment practices of the Respondent, Continental Air Lines, and that will involve going into some detail into the qualifications of commercial airline pilots, the procedure that Continental follows in obtaining applicants, interviewing them, and in selecting them for employment to fly its aircraft. We will, of course, also present testimony with respect to our dealings with Mr. Green and his interview at Continental and the procedures that were followed with respect to his case.

With respect to the specific allegations of the Complaint, the first, or one of them, is that Continental on its application form requires a photograph. We do require a photograph. We have for many, many years long prior to the passage of the Discrimination Act. We will show you that this has been our consistent practice customarily followed both in our industry and in other industries, and it certainly isn't for the reason of discriminating by reason of race, creed, color, or for any other reason, but that it has a legitimate business purpose.

Chairman Miller: May I interrupt, Mr. McClearn? Is it your position, also, that it is one of the exceptions within the Act? You allege that it is based upon a bona fide occupational qualification. Do you go beyond that as well?

Mr. McClearn: I am not certain I understand you, Mr. Miller. The Act itself in specific terms doesn't prohibit the use of a photograph. As I read it, it prohibits the use of anything with the intent to discriminate. We will show that we use a photograph or ask for a photograph with no intent to discriminate but for another purpose, for a legitimate business purpose.

Chairman Miller: Is that the Act?

Mr. Sayers: Yes.

Chairman Miller: What I was referring to, there is specific language in the Act about exceptions in the case of a bona fide occupational qualification. All I am asking now is whether or not your position is that the photograph is the exception permitted under the bona fide occupational qualification and whether or not you go beyond that as well.

Mr. McClearn: Yes. I would say your inquiry is two-fold when we are talking about the photograph. First of all, do we have it with intent to discriminate, and we hope to show you we certainly don't. Secondly, we hope to show, even if it did discriminate, it is based on a business reason or an occupational qualification, but I don't think we even got to that point, Mr. Miller.

Chairman Miller: This is a provision in the Act to which I am referring. Section 5(4): "For any employer to make [fol. 206] any inquiry, either directly or indirectly, any limitation, specification or discrimination as to race, creed, or color, or intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification".

Mr. McClearn: Our basic position is that this has nothing to do with discrimination. We are not seeking to say that it discriminates but we come within a qualification. We are saying it has no—

Chairman Miller: You are saying this provision has no application because you don't discriminate at all.

Mr. McClearn: It certainly has nothing to do with discrimination.

Chairman Miller: All right, sir. I am sorry to interrupt you.

Mr. McClearn: Then with respect to the other allegations, another one is whether our application form calls for the indication of race. We have admitted in our Answer that it did. That form was changed in 1954 and we certainly don't have that in our form now. There is no reason for it.

The other specific allegation is that Mr. Green was not notified within ten days as to whether we were going to hire him. The fact of the matter is, which our evidence will show, that he was notified but that the notification to him was misdirected and as soon as this was called to our attention [fol. 207] we did notify him at his then current address.

That, in synopsis form, is what we hope to show, what we intend to show and we are confident that at the conclusion of the hearing the Complaint will be dismissed.

Chairman Miller: All right, sir.

Mr. Sayers: Mr. Green, will you take this chair over here, please?

MARLON D. GREEN, called as a witness in his own behalf, was duly sworn and testified as follows:

Direct examination.

By Mr. Sayers:

Q. Mr. Green, will you state your full name and address?

A. My full name is Marlon DeWitt Green, resident of 608 North Logan, Lansing, Michigan.

Q. What is your present occupation, Mr. Green?

A. I am the Department Pilot for the Michigan State Highway Department.

Q. And are you the same Marlon D. Green that filed complaint with the Colorado Anti-Discrimination Commission and which we are hearing at this time?

A. I am.

Q. When did you file such complaint?

A. An initial letter of contact to the Colorado Anti-Discrimination Commission was sent in early August 1957, outlining my belief that the law had been violated in these circumstances as explained in that letter. Subsequently I [fol. 208] received correspondence from the Commission with official forms to be filled in and returned for further action to conclude this matter.

Q. What is your present occupation, Mr. Green?

A. I am a pilot for the Michigan State Highway Department, in which capacity I act as the provider of executive transportation for highway officials who have to travel in any capacity in connection with their duties. Further, to take engineers or specialists on survey trips to review highway locations and construction progress, and as our equipment is received we expect to perform aerial photography for the purpose of highway construction.

Q. What did you do before entering upon your present employment?

A. Immediately prior to my present employment I was unemployed for four months while seeking employment as an airline pilot. Prior to that period of unemployment I was an officer in the United States Air Force, Pilot Officer.

Q. When did you enlist in the United States Air Force?

A. The date of enlistment was the 5th of February, 1948.

Q. What was your rank at the time of enlistment?

A. I was a private.

Q. When were you selected for pilot training?

A. I received notification, I believe in November of 1949, [fol. 209] with a reporting date for training in March of 1950. I was in Hawaii at the time and the reporting location was to be San Antonio, Texas.

Q. What educational qualifications were required for pilot training?

A. Applicants must be high school graduates and must have the equivalent to, well, anyway, to please the Air Force, of two years of college or two-year college equivalency was the requirement succinctly.

Q. What air force schools did you attend during your tour of military duty?

A. Besides the Air Force Pilot Training, which was a course of one year's duration in which I trained in a T-6 Trainer and the B-25 Light Bomber, I attended and completed the combat crew training school at Randolph Field, San Antonio, Texas, in the B-29 type airplane. Subsequently, the Squadron Officer Course for administrative training for Air Force Officers at Maxwell Field, Alabama. The C-97 Heavy Transport Transition School at West Palm Beach, Florida, the B-29 Aircraft Commander Transition School at Randolph Field, San Antonio, Texas, the Air Force Amphibian Training School at West Palm Beach, Florida. Those are the extent of the courses.

Q. And did you complete all the prescribed courses of study required for pilot training?

A. I did.

[fol. 210] Q. Do you have any documentary evidence that the prescribed courses of study were completed satisfactorily?

A. I do.

Q. Of what does that consist?

A. I have in my individual possession, not available to us at this moment, individual certificates of completion which are summarized and concluded in my Air Force Discharge paper, Form 214, which is an official document available to the Commission at this time.

Q. I hand to you herewith a document which I will ask you to name. Tell the Commission what it is, first.

A. This is a copy of my Discharge Certificate, officially commonly referred to as the DD Form 214.

Chairman Miller: Excuse me, do you propose to introduce this?

Mr. Sayers: I want to introduce it after he has told us what it is.

Chairman Miller: Do you want to have it marked as an exhibit first?

Mr. Sayers: As an exhibit first.

(Complainant's Exhibit 1 was marked for identification.)

By Mr. Sayers:

Q. I will ask you again now since this document has been marked Complainant's Exhibit 1, if you will tell the Commission what it is.

A. This is a photostat of the Air Force Discharge Record [fol. 211] commonly referred to in the Air Force, anyway, as the DD Form 214.

Q. And does this show the schools and training that you have had?

A. It shows the formal schools and training which were completed in the Air Force. I would like to point out it does not list specifically the thing which might be assumed very reasonably, that I completed the Air Force Pilot Training School. That was not listed as one of the schools here since at the time of completing this form it did not seem a requirement to say that a man who has flown through all these different flying schools as a pilot had to go to the pilot training school first. So I beg to point out that that is not shown here, that I completed the initial training course as a pilot. Do we have that information available? Then I would like the privilege of submitting it.

Chairman Miller: Let's pass on this exhibit first.

Mr. McClearn: We have no objection.

Chairman Miller: No objection? It will be admitted. Thank you.

(Complainant's Exhibit No. 1 was received in evidence.)

The Witness: Mr. Chairman, it has been pointed out that perhaps for clarification I should identify the particular section of this DD Form 214 which contains certification of my Air Force schooling, of flight training.

[fol. 212] Chairman Miller: All right. You are referring now to Complainant's Exhibit 1?

The Witness: Exhibit 1, Section 28, Title "Service Schools or Colleges, College Training Courses and/or Post-Graduate Courses successfully completed."

Mr. Sayers: Then he has given the list of the schools that you have completed, is that correct?

The Witness: Right. Further, I would like to refer to Section 29. Incidentally, "Armed Forces Intelligence Test

Passed", they call it the 2CX Test, it was a military defense department test. 2CX means a 2-year college equivalent, which was passed in 1952 as shown in Section 29 of this same document.

Chairman Miller: All right, you may proceed, Mr. Sayers.

Mr. Sayers: I should like to have this marked Complainant's Exhibit 2.

(Complainant's Exhibit No. 2 was marked for identification.)

By Mr. Sayers:

Q. Mr. Green, I will ask you to look at the document numbered Complainant's Exhibit 2 and tell the Commission what it is.

A. This is a copy of the personnel order declaring myself, among numerous other persons listed, as Air Force Rated Pilots. The final statement, I will read this item, if I may, "Having completed—

[fol. 213] Q. Wait a minute.

Mr. Sayers: Would you care to see this?

I should like to offer this in evidence.

Chairman Miller: Any objection, Mr. McClearn?

Mr. McClearn: Is that a two-page document? This isn't the complete document, Mr. Green.

The Witness: There were other names on the reverse side of that document.

Mr. McClearn: No objection.

The Witness: On the reverse side also is shown an official certification. However, this letterhead is offered as being official and reproduction of the reverse side can be obtained, I am sure.

Chairman Miller: This is a reproduction of the original?

The Witness: That is a reproduction of the front side of the original.

Mr. Sayers: We do have the original. We can provide the back if you want it.

Chairman Miller: It is not necessary. Complainant's Exhibit No. 2, then, will be admitted in evidence.

(Complainant's Exhibit No. 2 was received in evidence.)

By Mr. Sayers:

Q. Mr. Green, does your name appear on Complainant's Exhibit No. 2?

[fol. 214] A. It does.

Q. And what does it show generally, can you give us a brief statement of what this Complainant's Exhibit No. 2 exhibits?

A. This is an official document required by Air Force Regulations prior to the assumption of flight duty by a rated pilot. He must be declared officially as being rated. This document so declares me among others.

Q. And what date do they say that you are rated as a pilot?

A. As of 24 March 1951. This document is dated 23 February 1951.

Chairman Miller: May I ask, is this the first rating that you had as a pilot?

The Witness: This is the result of the successful completion of the Air Force Pilot Training School, that you are declared a rated pilot and incidentally commissioned as a Second Lieutenant, in my case. I would like to point out that some others were officers as they were going through the pilot training program. I think that is understood.

By Mr. Sayers:

Q. Mr. Green, what kind of aircraft did you fly during your military career?

A. My training commenced in a T-6 Trainer, subsequently in a B-25. After being rated as a pilot as shown in Exhibit 2, [fol. 215] I flew the B-29, the B-26, the SA-16, the C-45, or a Twin Beach as it is commonly known, and though not as a qualified First Pilot, I did fly the C-97 and the C-47, or DC-3 as it is commonly known.

Q. Mr. Green, for the benefit of those who are not familiar with the different types of planes, I wonder if you would describe to the Commission the T-6, what does that mean, what does "T" mean?

A. "T" is an Air Force designation, I mean in reference to airplanes is an Air Force designation for Trainer Force

Airplane, and this particular airplane is built by the North American Aviation Company, designed as a vehicle for initial pilot training, at least that is what it was used for at the time of my training, initial indoctrination in the fundamentals of aviation.

The B-25, as used during the Second World War, is a light bomber, or was called then a medium bomber, subsequently redesignated as a light bomber.

The B-29 was a very heavy bomber originally. As things progressed it became, I think it is classified now as a medium bomber.

The B-26 Twin-Engine Airplane designed and built by the Douglas Aircraft Corporation of California which was during the World War classified as a medium bomber, presently classified as a light bomber, almost extinct any more in the Air Force.

[fol. 216] The SA-16 is an amphibian airplane and used during my training as a rescue vehicle.

The C-45 was commonly used as an Air Force executive transportation or utility airplane.

The C-97 is a transport designed by the Boeing Company, used by commercial airlines for intercontinental routes primarily.

The C-47 is very commonly known as the work horse of the Air Force or for commercial aviation, for that matter.

Q. Now, Mr. Green, how many flying hours have you logged?

A. I have logged at the present time a total of approximately 3400 hours. As of July—pardon me, June 26, 1957, my official record shows 3,071 hours, approximately.

Q. And do you have any documentary evidence to show the flying hours that you have logged?

A. I do have.

Q. And of what does that consist?

A. I have the final sheet of my Air Force Form 5, which usually is a monthly compilation of flying time by the individual pilot. This is an official document of the United States Air Force. The original copy of this document which you will see here is on file with the Director of Flight Safety Research, Norton Air Force Base, California.

Mr. Sayers: I should like to have this exhibit marked Exhibit 3.

[fol. 217] (Complainant's Exhibit No. 3 marked for identification.)

By Mr. Sayers:

Q. Mr. Green, I will ask you to look at Complainant's Exhibit 3 and tell the Commission what it is.

A. This is the Air Force Form 5 known as the "Individual Flight Record" for pilot, and this happens to be my personal copy, copy of my own flight record for this particular month. May I include this—

Mr. Sayers: Just a minute.

Mr. McClearn: No objection.

Chairman Miller: Have you offered this?

Mr. Sayers: I would like to offer Complainant's Exhibit No. 3.

Mr. McClearn: No objection by Respondent.

Chairman Miller: Complainant's Exhibit 3 will be admitted.

(Complainant's Exhibit No. 3 was received in evidence.)

By Mr. Sayers:

Q. Mr. Green, I will ask you to refer to Complainant's Exhibit No. 3 and tell the Commission what it is.

A. This is the Air Force Form 5 for Air Force Pilot First Lieutenant Marlon Green as of March 1957, listing the accumulation of flying time for that particular month, and in connection with that flying time for that month it [fol. 218] shows the accumulated flying time for Green's Air Force Flying career. This is the last one issued for myself during my tour of duty in the United States Air Force.

Q. And will you break down the items of that report so that the Commission may know just what it shows?

A. This form shows that during the month of March 1957 the only type airplane flown by Pilot Green is the SA-16A, and I will go on then to break down the particular

classifications of First Pilot Time which were instructor pilot time. This was not for the month of March, I would like to point out, but this is an accumulation or the summation of these totals. By classification they are instructor pilot time 166:30, that is 166 hours and 30 minutes; first Pilot time, 1838 hours and 15 minutes; First Pilot time, day, VFR (Visual Flight Rules), 1348 hours even; day, weather instrument time, 99 hours and 40 minutes; First Pilot night time under visual flight rules, 319 hours 45 minutes; First Pilot night time under weather instrument conditions, 53 hours 50 minutes; First Pilot flight time under hooded-in flight conditions, 183 hours 30 minutes.

The next section is the classification of copilot flying time, total copilot flying time 778 hours 45 minutes; copilot, day, visual flight rules, 582 hours 20 minutes; copilot, day, under weather instrument conditions, 46 hours 35 minutes; copilot flight under visual flight rule conditions, 124 hours, 55 minutes; copilot night flying time under weather instrument conditions, 24 hours, 55 minutes.

On the reverse classification—pardon me, the title is “Summary of Pilot Experience”. Duty, aircraft instructor pilot, single engine 37 hours; aircraft instructor pilot, twin-engine, 129 hours 30 minutes; total, 166:30.

First Pilot time, single-engine, 72 hours 35 minutes; First Pilot time twin engine, 1469 hours 40 minutes; First pilot time more than two engine, 292 ten minutes; single jet propulsion, First Pilot time, 2 hours even; multijet propulsion First pilot time, 25 minutes; rotary wing type, including helicopters, which was a helicopter, rotary wing type, 1 hour 25 minutes. Total First Pilot time, 1858 hours 15 minutes—I am sorry, First Pilot 1838 hours 15 minutes. Copilot time, single engine, none; twin engine, 466:05.

Chairman Miller: That is what, “05”, 5 minutes?

The Witness: 5 minutes, I am sorry.

More than two engine copilot time, 308 hours 15 minutes; copilot time, rotary wing 4 hours 25 minutes; total, 778 hours 45 minutes; total pilot time as a student, 288 hours even. Total pilot time subsequent to student training, 2,783:30. May I check the original on that?

Q. That is correct.

A. Total Air Force flying time, student and sub-student—I mean post-student—3,071 hours 30 minutes.

Miscellaneous entries on this same form, GCA approaches [fol. 220] under actual conditions, 150.

Chairman Miller: What is a GCA approach?

A. Ground control approach, an approach by a radar observer on the ground giving verbal instructions to the pilot in flight making an instrument approach.

Instrument trainer, 127 hours. That is a link trainer which you may have heard of which simulates in-flight instrument conditions. The pilot is enclosed in what simulates an airplane cockpit and therein he flies prescribed maneuvers simulating in-flight or in-cloud conditions. And flight simulated hours totaled 4 hours.

Q. Is that the total showing of this Exhibit 3?

A. I feel it is the total significant showing.

Chairman Miller: Who authenticates this, Mr. Green?

The Witness: Directly, Major Lyle Davenport, on that form. In any case it would be the Operations Officer or someone directed by the Commanding Officer of the squadron. In the usual case it is the Operations Officer of a flight squadron.

Chairman Miller: This is all the army record?

The Witness: That is the Air Force record.

Chairman Miller: Air Force, excuse me.

By Mr. Sayers:

Q. Mr. Green, do you have a pilot's license?

A. I do.

Mr. Sayers: I would like to have this marked Complaint [fol. 221] and Exhibit 4, please.

(Complainant's Exhibit No. 4, marked for identification.)

Q. Mr. Green, I will ask you to look at Complainant's Exhibit 4 and tell the Commission what it is.

A. This is a copy of my pilot's license.

Mr. Manzanares: When you mention pilot's license, is that the license issued by the Civil Aeronautics authority?

The Witness: That's correct.

Mr. Manzanares: For a pilot in commercial or civilian aircraft?

The Witness: Right.

Chairman Miller: Are you offering this?

Mr. Sayers: Yes, I want to offer Complainant's Exhibit 4.

Mr. McClearn: No objection.

Chairman Miller: Complainant's Exhibit 4 will be admitted.

(Complainant's Exhibit No. 4 was received in evidence.)

Mr. McClearn: Could I have the date on that?

The Witness: 9-27-57. In connection with that date may I offer information.

Chairman Miller: You may inquire.

By Mr. Sayers:

Q. Mr. Green, will you read this Exhibit 4 to the Com-[fol. 222] mission, please?

A. This is a form issued by the Civil Aeronautics Administration, which certifies that Marlon DeWitt Green, giving permanent address, date of birth, height, weight, color of hair, color of eyes, sex, nationality, has been found to be properly qualified to exercise the privileges of commercial pilots—pardon me, commercial pilot with license No. 1364938.

Q. Who is that signed by?

A. I would like to quote these ratings first, airplane single engine land, and at this point I would like to offer some information for the benefit, I think, of the Respondent, that at the time of my application to the Respondent this particular qualification as Airplane Single Engine Land was not in my possession. It is not relevant to the hearing at hand, but I would like to point that out as being a fact. However, at the time of my application to Continental Air Lines, Respondent, I did possess the qualifications and ratings and limitations shown here.

Airplane Multiengine Land and Sea with Instrument Rating. It is signed by Roy Keeley, and the date of this particular form is 9-27-57. This particular form was issued subsequent to my application to Continental Air Lines as

a result of my having achieved an additional rating, the single engine land rating as referred to.

Chairman Miller: As I understand your testimony, you [fol. 223] say certain qualifications were possessed by you at the time of your application to Continental, which qualified you to the extent of obtaining the certificate, the license?

The Witness: I would like to correct that to show at the time of my application to Continental Air Lines I did not possess a pilot rating for single engine type airplanes. This, of course, since Continental flies no single engine airplanes of course has no bearing on this particular case, but I would like to point out in fairness to the Respondent that my pilot's license as presented to Captain Cramp during interview did not show airplane single engine land license, in case any confusion might arise over that point subsequently.

Chairman Miller: What did it show?

The Witness: It showed airplane multi-engine land and sea with instrument rating, and on the 27th of September I accomplished a further rating, airplane single engine land, which modified that license and had to be reissued by the Civil Aeronautics Administration regulations.

Chairman Miller: Was there a previous license, then?

The Witness: That is what I am trying to say.

Chairman Miller: All right, sir. This has been admitted.

By Mr. Sayers:

Q. Mr. Green, are military pilots trained and instructed to take chances when flying?

[fol. 224] A. Your question is, are they?

Q. Yes, are military pilots trained and instructed to take chances when flying?

A. No, they are not.

Q. What was your military rank when you were discharged from the Air Force?

A. I was Captain.

Q. And why did you leave the Air Force?

A. To seek employment as a commercial airline pilot.

Q. After deciding to look for a job as a commercial airline pilot, how did you go about finding a job?

A. As soon as my interest and intent became definite, I sent letters while stationed in Japan to most of the major carriers in the United States and at the same time I made personal contact with some of the carriers who had offices in Japan, specifically Tokyo. Subsequent to my return to the United States I made personal applications as well as pursued some applications by mail and by telephone.

Q. And did any of the airlines to which you applied or private carriers turn down your application because of your color?

A. There were direct expressions of refusal based on my color. To quote one company—

Mr. McClearn: Excuse me. I have no objection to the evidence, as such, but I would like to point out I don't think [fol. 225] it is material to this inquiry.

Chairman Miller: I agree it is not material here. I think it should be confined solely to this particular application.

By Mr. Sayers:

Q. Mr. Green, you made application to the Continental Air Lines at this time or approximating this time, did you?

A. I returned to the United States from Japan on the 20th of April, 1957, and sometime before the end of April, I don't remember the date on my initial application, I sent an application form which had been secured through the San Francisco office of Continental Air Lines. I sent this form to the Denver office for consideration for pilot employment.

Q. And do you have a copy of that form with you by any chance?

A. The application form?

Q. Yes.

A. No, I do not have.

Q. After you made your application, what was the response of the Continental Air Lines?

A. I received a letter, oh, within three weeks, I don't remember the time that transpired, I received a letter saying that "We are not hiring pilots at this time. We will keep your application on file and contact you when we are considering pilots for employment in the future."

[fol. 226] Q. What job did you make application for?

A. For airplane pilot or airline pilot, copilot specifically.

Q. Did the application form which was given to you have an indication as to race or color on it?

A. Yes.

Q. And when you made the application, when you filled out the application, did you fill in the designation as to your racial character?

A. I did.

Q. Did Continental Air Lines know, so far as you know, that you were a Negro?

A. No.

Q. Whether or not you were a Negro.

A. No, I had no knowledge that they knew my race.

Q. When were you asked to appear for an interview, if ever?

A. I think I received a telegram in New York on, I believe—I am not sure of the date, sometime around the 20th of June, essentially asking, "Are you still interested in pilot employment with our company?"

Chairman Miller: What year?

The Witness: Pardon me?

Chairman Miller: What year?

The Witness: I am sorry, June 1957, and this telegram [fol. 227] I believe is available to us here. This is the wire which I received.

Mr. Sayers: I would like to have this marked, please, as Complainant's Exhibit 5.

(Complainant's Exhibit No. 5 was marked for identification.)

By Mr. Sayers:

Q. Mr. Green, I will ask you to examine Complainant's Exhibit 5 and tell the Commission what it is.

A. This is a telegram from the representative of Continental Air Lines, Mr. Sorby, and the message contained—

Mr. Sayers: I should like to offer in evidence Complainant's Exhibit No. 5.

Mr. McClearn: No objection.

Chairman Miller: Complainant's Exhibit No. 5 will be admitted.

(Complainant's Exhibit No. 5 was received in evidence.)

Mr. White: I would like to ask a question. You asked Mr. Green on his application form whether he had filled out what his race was. Also in connection with that application form it asked for a photograph. Did you attach the photograph?

The Witness: I did not.

By Mr. Sayers:

Q. Mr. Green, I will ask you to examine Complainant's [fol. 228] Exhibit 5 and read it to the Commission.

A. It is a Western Union telegraph to Marlon Green from Denver, Colorado via El Dorado, Arkansas, with my address being listed 180 West 135th Street, New York, I presume; it doesn't show that here. I would like to strike that. "Advise by collect wire at earliest convenience if still interested in possible pilot employment in near future." Signed, Mr. Ken C. Sorby, Employment Manager, Continental Air Lines, Inc., Denver, Colorado.

Q. Mr. Green, I will ask you what was your response to that telegram?

A. I sent a telegram to Mr. Sorby indicating that I was indeed interested in pilot employment with his company and requested further instructions.

Q. And did you receive further instructions?

A. I did in a subsequent telegram.

Mr. Sayers: I would like to have it marked Complainant's Exhibit 6.

(Complainant's Exhibit No. 6 marked for identification.)

By Mr. Sayers:

Q. Mr. Green, I should like for you to look at Complainant's Exhibit 6 and tell the Commission what it is.

A. This is a telegram from Mr. Sorby of Continental Air Lines in response to my telegram in response to his initial one.

[fol. 229] Mr. Sayers: I should like to offer in evidence Complainant's Exhibit No. 6.

Mr. McClearn: No objection.

Chairman Miller: Complainant's Exhibit No. 6 will be admitted.

(Complainant's Exhibit No. 6 was received in evidence.)

By Mr. Sayers:

Q. Mr. Green, I will ask you to examine Complainant's Exhibit No. 6 and read it to the Commission.

A. This is a telegram from Mr. Sorby in Denver, Colorado, to Marlon D. Green, 181 West 135th Street: "Appreciate your coming to Denver for interview at earliest convenience Trans World Airlines pass New York/Denver roundtrip will be available for your pickup at airport ticket counter. Service charge of \$10 and other expenses will be to your own account. Advise approximate date of travel", and it is signed incorrectly, I think, Mr. Ken S. Corby, which should be corrected to Ken C. Sorby, I believe.

Q. Mr. Green, what was the next step after receiving this telegram?

A. Upon receipt of this telegram I notified Trans World Airlines' office in New York that instead of accepting travel from New York to Denver it would be to my convenience to travel by personal car from New York to Lansing, Michigan, [fol. 230] and then to accept airline transportation at Continental's expense from Detroit, Michigan, to Denver and return. This arrangement was made prior to my departure from New York, and after arriving in Lansing I made contact with the Detroit office of Trans World Airlines to confirm that this arrangement had been agreed on, and on the date of travel, which I do not remember now, I believe it was around the 24th of June, 1957. I reported to Trans World Airlines' ticket counter at Willow Run Airport, Ypsilanti, Michigan, for transportation to Denver. This transportation was arranged and completed.

Q. Do you remember the date that you arrived in Denver?

A. I believe it was the 24th, the night of the 24th.

Q. Of what year?

A. Of June 1957.

Q. And then what happened? Tell the Commission what happened on your arrival in Denver.

A. I am trying to think if I made any contact with Continental that night. I don't believe I did. I secured lodging and the next morning reported to the Continental office at Stapleton Airfield, Denver, asking for the Personnel Office, which I understood was at that location. I was corrected that the Personnel Office was located at another place than the Airport, and I asked then instructions as to where I should proceed for further information about my application or my processing. I was instructed to report to Captain Cramp, the Assistant Chief Pilot whose office is at the [fol. 231] Airport, and at this time I proceeded to contact Captain Cramp and place myself at his disposal.

Q. Will you proceed and tell the Commission what happened, how you met Captain Cramp and what followed?

A. I was directed to Captain Cramp's office, introduced myself, and talked with him briefly. He informed me that—among other things that we discussed, he said that I was the first Negro pilot who had ever applied to his company for a pilot job and it was the company's policy, in his words, to "Give everybody a crack at it." His next instruction to me was to proceed to the link trainer department in that same hangar at the airport for check ride in the link trainer.

I reported to the instructor to whom Captain Cramp had directed me, and when my turn came to take my check I completed it, and upon completion, Captain Cramp was standing by and he indicated his satisfaction at my performance.

Q. Mr. Green, let me interrupt here to ask you to explain to the Commission what is a link trainer?

A. A link trainer is a device for simulating instrument flight conditions. The student pilot is placed in this container and he has controls inside which are comparable to all the controls in the airplane, the regular flight controls, and he has instruments and he has a radio set on all the essentials for the performance if he is capable, and as I say, [fol. 232] it simulates instrument flight conditions, that is flying in the clouds when you have no reference to the ground or the horizon as a reference and you must rely solely upon your instruments which are available to you in the airplane, your radio, this is a navigational aid, and

to your piloting skill to maintain the airplane—well, to control the airplane as you desire it.

Q. After you had taken this link trainer test you say there was an expression by someone that you had successfully completed the test?

A. Captain Cramp expressed satisfaction at my performance and gave me further instructions for procedure.

Q. What was your next instruction?

A. Captain Cramp and I went back to his office, then, and talked about this matter again. I don't remember any particulars.

Mr. McClearn: Excuse me, Mr. Green, I don't mean to interrupt. I apologize that Mr. Cramp hasn't gotten here yet. He is on his way down. I wonder if it would be appropriate to take the noon recess so that we could reconvene when he will be present, when Mr. Green is testifying about your conversation with him.

Chairman Miller: Unless there is something else you would like to take out of order, although this, I think, is all right chronologically. Maybe it is just as well. It is approaching 12. Shall we recess until 2 o'clock.

[fol. 233] Mr. McClearn: At your convenience.

Mr. Manzanares: Until two?

Chairman Miller: Yes. I would like to do some of my own work, too.

Mr. White: Mr. Miller, I have a ticket to go down by Frontier to Pueblo at 4:45 and I don't know how long this is going to take.

Mr. Sayers: We won't start to be through by that time.

Chairman Miller: Unless you absent yourself, I would guess that we will be going all day.

Mr. Sayers: All day and part of tomorrow, I think.

Mr. McClearn: I don't want you to think I am trying to slow us down.

Chairman Miller: No, that is perfectly all right, because I have plans, too, and I think it fits in nicely. If it is agreeable, then, we will recess until 2 o'clock.

Mr. Westfeldt: Mr. Chairman, may I say one thing?

Mrs. Budin: Couldn't we come back at one?

Chairman Miller: Well, I am sorry, I really have things to do.

Mr. Westfeldt, did you have a comment?

Mr. Westfeldt: I did want to say, and it is off the subject of what is being discussed now, I am just not quite sure I said what I probably should have said with respect to [fol. 234] this constitutionality and jurisdictional question that I raised earlier, that I do want it in the record also to show that proceeding with the hearing on the merits in this case, the Respondent is not waiving its assertion of those rights and its assertion of those laws, and I just wanted to do whatever is necessary to preserve that.

Chairman Miller: I think the record will show that in every instance and particularly at the outset you will have raised the objection of constitutionality and jurisdiction and that you have renewed such objection wherever proper.

Mr. Westfeldt: Continental Air Lines does have an office within the State of Colorado and notice was given under the Act, and so personally we feel obligated to be here, but I don't want the proceeding to constitute a waiver by the Respondent.

Chairman Miller: I think the record shows that clearly.

(Whereupon, at 12 o'clock noon a recess was taken until 2 p.m. of the same day.)

[fol. 235]

AFTERNOON SESSION

2:00 p.m.

(Commissioner Robert Keeler was absent from the afternoon session.)

Chairman Miller: All right, Mr. Sayers.

MARLON DEWITT GREEN, resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Sayers:

Q. Mr. Green, during your interview with Captain Cramp, did you talk with him about your application blank?

A. Yes, I did:

Q. And will you tell the Commission in general what was said regarding your application?

A. In the course of a normal interview of this sort, it has been my experience that a man in Captain Cramp's position would sit down with the applicant and review the items of his application form, particularly those in Captain Cramp's position, which would pertain to operations or flying experience. These are mainly the things which we discussed on that day. They concerned my flying record in the Air Force, my flight log, which I am not sure now whether Captain Cramp reviewed that, but I believe that he did, and further we discussed an item in my application form concerning my race, and Captain Cramp was very appropriately interested in why I had not filled this item in. I would like to emphasize that his manner of inquiring about this was very appropriate, that he was just a bit curious [fol. 236] as to why this item had not been filled in. I indicated something to the effect that I did not feel that—being a Negro I would like to give myself every benefit of the doubt where my application was concerned, and I felt that the history of such entries on application forms had been that they had been used prejudicially against Negro applicants and for that reason I had not filled it in, and I explained something to this effect to Captain Cramp on that day.

Q. And did the Captain ask you to fill it in, to fill in that blank regarding your race?

A. Yes, he did, and I did so on that occasion.

Q. You did so on that occasion. Do you know whether or not up to this time, except at the time of your interview, did they know that you were a Negro?

A. I do not know whether Continental Air Lines knew my race or not.

Q. Did they require you to furnish a photo?

A. There was a request for a photo as a part of the application blank which I submitted from San Francisco to the Denver office.

Q. And did you finally furnish the photo?

A. No, I have not supplied one to this date.

Q. Was there any particular reason given for your filling in the name "Negro" in the blank so specified?

A. As it was indicated to me by Captain Cramp, it was a [fol. 237] matter of simply completing the form.

Q. What was the date of your birth?

A. 6 June 1929.

Q. What is your height and weight?

A. 6 feet in height, 190 pounds in weight.

Q. Have you ever been in an airplane accident when you were either acting as a pilot or as a copilot of the aircraft?

A. There was one aircraft accident in my training period, in fact, it was my first attempt at a takeoff in which neither the instructor nor I could recover from the situation I got in. We wound up on the side of the runway with a bent wing. Then further than that, there have been no aircraft accidents in my flight history.

Q. Returning now again to the conference with Captain Cramp, what else transpired after you went back in for your second interview with him?

A. I think I have indicated that I don't recall the details of this—this was between the link—it was on the day, my first day of meeting Captain Cramp. The period I think you are referring to is the period after I completed the link trainer flight.

Q. That is correct.

A. The link trainer test.

Q. That is correct.

A. Now, I do not recall the particulars of our discussion [fol. 238] at that time. However, I think they ran generally about pilot qualifications, the company's operating policy, its routes, possibly the number of pilots, the average flying hours and things of that sort. I do not recall anything in particular.

Q. Then what followed that interview, what was your next instruction after you had completed your interview with Captain Cramp?

A. I asked Captain Cramp if there was anything on that day that he desired me to do in connection with my processing or application, and he indicated that the next thing that he knew that I should do was to report to him on the following day for a flight check which he scheduled, I believe, for

11:30 on the following morning, and at that time I left the airport and returned to the city.

Q. On the following morning did you report for the flight check?

A. I did. At approximately 11 o'clock I arrived at the airport. I think we flew around 11:45 or 12 o'clock for 45 minutes.

Q. With whom did you fly?

A. With Captain Cramp.

Q. What was his expression after the flight as regarding your handling of the machinery, and so forth?

A. Every statement concerning the flight was that I had performed to his satisfaction, which is my impression to [fol. 239] date as to that flight.

Q. And then what happened after your flight?

A. Captain Cramp and I went back to the hangar after we had deposited the airplane at the passenger terminal, and I am not sure if we went to his office or not, but we did go to the cafeteria for the purpose of meeting Mr. Sorby. This had nothing, necessarily, to do with my application or with the processing of the application, but since I had communicated with Mr. Sorby in making arrangements to come to Denver, and he understood that Mr. Sorby was at the airport at that time. We went to the cafeteria in search of him. We finally found him there and made his acquaintance.

Q. Did you have an interview with Mr. Sorby?

A. It was not an interview, just a brief meeting of introduction.

Q. What else transpired during your visit in Denver at that time?

A. Sometime shortly after having met Mr. Sorby, I asked Captain Cramp if there was anything else he desired me to do. The possibility of taking a flight physical was mentioned. However, he said it would not be necessary until further decisions had been made. I wouldn't like to offer that as a quote of Captain Cramp, but he said "Just forget about taking a physical until later", I should put it that way. And on this occasion, then, I asked Captain Cramp if there [fol. 240] was anything further that I should do or that he wanted me to do in connection with my processing. He

said there was nothing else and I could return to Lansing. So I believe it was on the night of that same day that I did leave Denver, returning to Lansing, feeling that I had performed satisfactory in all the things that had been required of me and that I would be notified within ten days of that date, the 26th of June, 1937.

Q. Did you finally receive a notice as to their decision?

A. Finally I did.

Q. And when was that?

A. I believe I should refer to my initial letter of contact if we have a copy available. I don't remember the date offhand.

Q. The date wouldn't be so important. It was within 10, 15, 20 days?

A. Within 20 days, I believe, not within the 10 as had been offered by Captain Cramp.

Q. And what was the decision that you received?

A. I should—this is a little lengthy in detail. I would like to explain it if I may. I had expected that I would receive notification from Continental Air Lines concerning my application at my home address in Lansing, Michigan, which was given at that time as being 913 Napp Street, Lansing, Michigan, and it was written on my application form while I was in Denver in June. During the 10-day period subsequent to June 26 I had received no notification [fol. 241] from Continental Air Lines, no communication of any kind, and even several days past the tenth day I had received no notification from Continental concerning my application. So I called Mr.—I don't remember if I placed the call for Mr. Bell or not, but I did talk to Mr. Bell in Denver by long distance from Lansing and inquired about my application, and asking him what his company's decision had been. Mr. Bell informed me at that time that to his knowledge a telegram had been sent to me at my Arkansas address, giving the information which is available to us here in one of these, I think it would be another telegram that we have. It said that "We regret to inform you—".

Mr. McClearn: Excuse me. We have the telegram here.

Mr. Sayers: I think we will wait just a moment and have this marked.

Chairman Miller: That is No. 7.

(Complainant's Exhibit No. 7 was marked for identification.)

By Mr. Sayers:

Q. Mr. Green, I will ask you to look at Complainant's Exhibit No. 7 and tell the Commission what it is.

A. This is a telegram from Mr. Bell representing his company, Continental Air Lines, notifying me of his company's action in regard to my application for employment.

Mr. Sayers: We would like to offer Complainant's Ex-
[fol. 242] hibit 7 in evidence.

Mr. McClearn: We have no objection to the telegram. I note that there is certain writing on there at the bottom, which perhaps is not properly considered by the Commission.

Chairman Miller: Yes, I think that can be disregarded.

The Witness: I am sorry, may I ask you to repeat on that? I didn't hear that statement.

Mr. McClearn: There is certain writing at the bottom of the telegram apparently by you which is not properly before the Commission.

Chairman Miller: Explain that.

The Witness: I admit that this is my writing and I understand your objection.

By Mr. Sayers:

Q. Mr. Green, I will ask you to examine Complainant's Exhibit 7 and read it to the Commission, if you will, please.

A. Telegram from Denver, Colorado, to Marlon D. Green, 913 Nipp Street, Lansing, Michigan: "Pursuant our telephone conversation following is copy of wire sent you last Friday at your permanent address 734 South Smith Avenue, El Dorado, Arkansas. Regret you were not selected for next copilot class. H. W. Bell, Jr., Director of Personnel, Continental Air Lines, Inc."

That is dated July 8, 2:06 p.m., 1957, Mountain Standard Time, I would presume.

[fol. 243] Chairman Miller: That will be admitted. No objection?

Mr. McClearn: No objection.

(Complainant's Exhibit No. 7 was received in evidence.)

The Witness: I would like to point out further, if I may, that to date I have no knowledge—I have inquired of my parents as to whether they received the telegram referred to and they admit that they have not received any such telegram for me. And I would like to further point out for the record that they have had an admirable history in relaying mail and other documents which they did receive. So I do not know where the telegram, which I understand has honestly left Continental's office, I do not know where it went or where it may be today. I know that I have not received it. My parents tell me they did not receive it.

Mr. White: How did they get this address, 734 South Smith Avenue?

The Witness: That is listed on my application form which Continental has, which was listed as my home address, as distinguished from my current address at the time, which should be 913 Nipp as shown on the telegram.

By Mr. Sayers:

Q. I would like to ask you whether you had any conferences with anyone other than Mr. Cramp here on this particular occasion?

A. There was nothing which I would designate as having been a conference. I talked to numerous other people of the [fol. 244] Company who were incidental to my being processed. I spent a few minutes chatting with the link instructor and several other people who worked on the line. Some of the other pilots who happened to appear in Captain Cramp's office during the day were there, and Mr. Sorby, as I mentioned before, in the cafeteria. But there was nobody to whom I had been referred for a formal interview or formal test of any kind. So, for the purpose of my being here, to my knowledge, Captain Cramp was the only person to whom I was responsible.

Q. Did you see anyone else who was here on a similar application as yours?

A. Yes. I met a young gentleman whom I refer to in my initial letter to the Commission as being a Mr. Bryant. He is the only one of two other applicants whom I happen to know by name. I assume that I have his name right. Mr. Bryant and the other gentleman whose name I do not know were appearing at Captain Cramp's office for the purpose of being interviewed for the job openings which had been discussed, and on the morning of the 26th, prior to my flying with Captain Cramp, these two gentlemen went together with Captain Cramp in the same airplane for the purpose of flight check, and on one occasion, I don't remember if it was the 25th or 26th, I happened to be chatting with Mr. Bryant, and as I think normal under these circumstances, we were discussing our mutual qualifications or our pilot history. He informed me that—

[fol. 245] Mr. McClearn: I wonder if it would be appropriate to object to that, Mr. Chairman.

Chairman Miller: I think so. I think the rules say we should be liberal, but it is hearsay unless it was in the presence of Captain Cramp.

The Witness: No, it was not in the presence of any other person.

Chairman Miller: I don't think it is admissible.

By Mr. Sayers:

Q. During your visit with Captain Cramp was he unkind or unpleasant at any time with you, Mr. Green?

A. Within the last 20 minutes I have had the occasion to speak to Captain Cramp and our rapport during this meeting a few minutes ago was ideal and identical to the rapport which existed on the day or days that I was here in June of 1956. I would designate his conduct as being gentlemanly, most respectful and kind.

Q. You said 1956.

A. Pardon me, 1957, I would like to correct that. In fact, if I may sum it up, I would say I have to admire Captain Cramp for his reception of me.

Q. What caused you, Mr. Green, to feel that you were not hired because you were a Negro?

A. I would call it, well, I guess we must call it a feeling, but it is based on my knowledge as a Negro that Negro [fol. 246] pilots have not been welcomed by commercial airlines.

Mr. McClearn: Excuse me, Mr. Green. I don't mean to be objectionable. I do submit this is not the type of facts with which the Commission should be concerned.

Chairman Miller: I think you are expressing now your own personal conclusions.

The Witness: That's correct.

Chairman Miller: I think the Commission would have to be bound by the facts. The Commission can draw the conclusions from the evidence and the facts as they are developed. I mean you are speaking now of the subjective attitude and subjective reaction which I think would not be admissible. I mean the Commission certainly from its own knowledge of these things would also have some comprehension of that, but we have to be guided solely by the facts.

Mr. Sayers: Perhaps I can reframe the question.

By Mr. Sayers:

Q. Mr. Green, did anything happen on your trip that would cause you to feel that you had been discriminated against?

A. Nothing which transpired during my time here in Denver.

Q. Did anything transpire after you left Denver that caused you to feel that this particular company was discriminating against you?

A. Well, I should like to retract here for a bit. The [fol. 247] application form—this is hearsay again; I am probably sure it would not be admissible. It is my opinion that pictures on application forms have been used adversely against Negro pilots.

Chairman Miller: You said your opinion. Do you know? Do you know it to be fact rather than its being your opinion?

The Witness: That Negro pilots have been refused? Yes, I do know that as a fact. I could cite the case of Capitol Air Lines.

Chairman Miller: Well, now, we must tie it in with this particular employment situation.

Mr. Sayers: I think so. I thought perhaps he could give us some definite act that had caused him to feel that he had been discriminated against. That is what I am asking.

Chairman Miller: If he can, as far as the relationship with the Respondent here is concerned.

A. Well, my situation as a pilot, my experience is the fact which leads me to believe that something has transpired in my application process which is prejudicial toward myself.

Chairman Miller: Well, that, again, is your own opinion and your own inference, and what you should be testifying to are specific facts, what took place after the flight, any subsequent facts bearing upon the relationship between you and Continental or any of their agents.

[fol. 248] A. There is no such evidence available to me. My only evidence is that I was refused employment with no reason given. Pardon me, I would like to modify that. I was not hired with no reason given.

Q. That caused you to feel that you had been discriminated against, did it?

A. Yes, it did.

Q. And you followed that by the filing of a complaint against Continental Air Lines?

A. Right.

Mr. White: I would like to ask him a question. I might disagree with some of these people whether it is admissible or not, but for my own information, in talking to this other pilot, Bryant, did he indicate to you that he had an appointment to talk to some other personnel in the personnel department for further interviews?

The Witness: Beyond what we were experiencing at the time?

Mr. White: Beyond Captain Cramp there, did he tell you that he was interviewed by anyone else?

The Witness: No, he did not.

Mr. White: One other thing. When you were discussing routes, was there anything brought out there that he felt that perhaps flying into different towns or something like that, that that wouldn't be in the best interest of the airline [fol. 249] to have a Negro flying these different routes?

The Witness: I gathered no such insinuation from Captain Cramp's conversation. There have been inferences to the subject earlier in the hearing.

Mr. McClearn: I am sorry, I don't understand.

The Witness: There have been inferences to this matter earlier in the hearing, particularly Mr. Westfeldt's comment regarding uniformity of circumstances between the carriers.

Mr. Westfeldt: I think just to keep the record straight on that, I was making a legal argument related to jurisdiction and constitutionality of the law under the circumstances, which has nothing to do personally, and I didn't mean to raise any particular inference as far as you were concerned.

The Witness: No, it could be taken generally, not to myself particularly, I am sure of that.

Chairman Miller: As I understand it, Mr. Westfeldt's argument was strictly on the law, on the question of jurisdiction.

The Witness: Yes.

Mr. Sayers: I believe that's all we have right now.

Chairman Miller: Let me ask, Mr. Green, do you know of any facts which developed subsequent to your flight with respect to the other applicants, what happened to them?

The Witness: No, I have no knowledge.

[fol. 250] Chairman Miller: No knowledge at all?

The Witness: No, sir.

Chairman Miller: You may inquire.

Cross examination.

By Mr. McClearn:

Q. Mr. Green, as I understand your testimony, as far as you know you were treated at Continental, when you were here, the same as all other applicants, is that correct?

A. To my knowledge, that's correct.

Q. And there were other applicants here at the same time you were here?

A. Two others.

Q. They were in Mr. Cramp's office at the same time you were that first day, were they?

A. I don't think we were ever in the office together but we were in the hangar together at the same time.

Q. Now, would you tell us when you filed your formal complaint with this Commission against Continental Air Lines?

A. The formal complaint date I believe is August 13.

Chairman Miller: It was acknowledged on August 13. Do you know when this was filed?

Mr. McClearn: About August 13 of 1957.

The Witness: That is when it was witnessed by the Notary.

Q. Filed about the same time.

A. Mailed the same day.

[fol. 251] Q. I see. You didn't come to Denver to file the complaint or discuss the matter with the Commission?

A. No, I didn't.

Q. Did you subsequent to receiving the telegram, which is Exhibit No. 7, again contact Continental Air Lines?

A. Did I contact Continental Air Lines?

Q. Yes.

A. Subsequent to receipt of this telegram?

Q. Yes.

A. May I see that. No, there was no contact subsequent to receipt of this telegram.

Q. You didn't make any effort to find out if your application was still pending or what disposition had been made of it?

A. That was Mr. Bell's information to me. I am still on the list as being a qualified pilot for consideration.

Q. I see.

A. That was mentioned in the telephone conversation.

Q. Mr. Bell told you that?

A. Yes.

Q. Now, it is also true, is it not, Mr. Green, that in the summer of 1957 you filed a number of complaints against private employers?

A. Private employers?

Mr. Sayers: I would object to that, if I may, please, [fol. 252] on the theory it doesn't have anything to do with this particular case.

Chairman Miller: I think that is a good objection.

By Mr. McClearn:

Q. The other applicants who were at Continental's office the same time you were, were they white or colored, Mr. Green?

A. They were both white, to my knowledge.

Mr. McClearn: I think that's all we have, Mr. Chairman.

Chairman Miller: Are there any further questions by members of the Commission?

By Mr. Manzanares:

Q. I would like to ask, Mr. Green, while you were here did either Mr. Cramp or anyone else connected with Continental Air Lines inform you as to their procedure of hiring following your check flights, and so forth? Specifically, did they say, "You will be placed on a list and we will notify you"? Did they make the information available to you as to what procedure they follow after the check flights?

A. No, there was no information made known to me as to what particular items Captain Cramp or the responsible person would make their decision on. I was informed that if I were selected—this was my understanding, anyway—that if I were selected I would be called back to Denver to commence training on July 15.

[fol. 253] Q. Or a pilot school or something of the sort?

A. That's correct, a 30-day training period which I think is standard with the company.

Q. But you were not informed that it would be important as to how high a rating, let us say, you received in the check flights or anything of the sort, you weren't told that?

A. For myself I did not feel that would be a pertinent inquiry because I feel so long as Captain Cramp indicates

fairness, that I need not ask by what standards he judges me so long as I am accepted or rejected fairly.

Mr. Manzanares: That's all.

Chairman Miller: Any other questions?

By Chairman Miller:

Q. Have you any knowledge at all, Mr. Green, of what happened to the group who took the tests at the time you did?

A. I have no knowledge. I am very interested in that.

Chairman Miller: I think that's all.

Mr. Manzanares: Excuse me, I will have to go back. I would like to ask one I forgot here.

By Mr. Manzanares:

Q. You indicated that Captain Cramp was satisfied with your check-out flights, link trainer and otherwise. In what way did he indicate his satisfaction, did he tell you straight out that everything was all right, or did he just seem satisfied?

[fol. 254] A. Concerning the link check, I do remember that he made some expression, I could not quote his words, some expression of satisfaction when he reviewed the report or chart which had been handed to him by the link instructor. But subsequent to the flight check I could not say with any degree of accuracy as to whether he gave me a particular word of satisfaction. However, judging reasonably the rapport that existed between Captain Cramp and myself there was, to my knowledge, no other conclusion to be drawn from his conduct.

Q. That is what I am trying to find out. After the flight check he did not indicate to you in any way—let us put it this way—that he was not satisfied with your performance in the plane?

A. Yes. I would express it myself that his attitude indicated satisfaction. I cannot say now with any degree of accuracy that he gave any words supporting that opinion mine.

Q. He didn't give you any indication that he was dissatisfied, either?

A. Of course not.

Mr. McClearn: May I ask one or two more?

Chairman Miller: Surely.

By Mr. McClearn:

Q. I gather that Mr. Cramp's attitude after the flight check was essentially noncommittal, would that be accurate?

A. Well, he didn't—it was not the matter under consideration as to whether I had been accepted or not, so he could not be committal Yes or No about that.

Q. No, noncommittal about how you flew the airplane.

A. No, I did not draw that conclusion from his behavior.

Q. Well, I am more interested in what he said. He didn't commit himself as to how you did?

A. No, he did not commit himself. As I say, I base this on my judgment of his behavior and mine, the rapport which existed between the two of us. My conclusion from that was that he was well satisfied with my performance on the plane.

Q. One or two other points I would like to clear up. You testified, I believe, that you were requested to supply a photo by Continental Air Lines. Were you specifically requested by a person to supply a photo, or was that just a request that was contained on the application form?

A. It was contained in the application form. There was no other verbal request on anybody's part.

Q. Now, you also testified that Captain Cramp said he would notify you within 10 days. Do you recall more specifically the substance of that conversation?

A. Relating to his offer of 10 days?

Q. He didn't say, for example, on the 26th of June that "You will hear from me by July the 6th"?

A. No, he didn't say "me". I am quite sure that his expression was "You will hear from us within 10 days." And [fol. 256] I would like to say, as I recall the expression, it was within 10 days, and not about 10 days or so.

Q. You testified that several days went past the 10-day period. Having examined the telegram, I am sure that you would now say that no more than 2 days had gone past.

A. That's correct, as I believe I stated, yes, on the 9th of July I had heard nothing from Continental so I called Denver by telephone and spoke to Mr. Bell, the personnel manager—I am quoting from a letter here, the initial contact letter to the Commission—"and spoke with Mr. Bell, the Personnel Manager, who said that a telegram had been sent to my parents' home in Arkansas. This, in spite of the fact that my present address was on file with Continental."

Q. Well, I think your memory is sufficient.

A. Yes. This was a total of, let's say June—13 days, wouldn't it be?

Q. If it were the 9th.

A. Yes, the 9th of July is the day I called Mr. Bell. I think that's accurate.

Mr. McClearn: Nothing further, Mr. Chairman.

Chairman Miller: I think that's all. Just a moment.

Mr. McClearn: Let the record show I am handing to Mr. Green Complainant's Exhibit 7, Western Union telegram which bears Western Union date stamp of 2:06 p.m. [fol. 257] on July 8, and ask him if it refreshes his recollection as to when he talked to Mr. Bell.

The Witness: On the 9th of July, which is a Tuesday, I would have to delay answering this question until I can check my telephone records which will show the date of that telephone call, as I would rather believe this information on the telegram, that the 8th is the correct date.

(Witness excused.)

Mr. Sayers: Mr. Chapman please.

ROY M. CHAPMAN, called as a witness on behalf of the Complainant, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Sayers:

Q. Mr. Chapman, will you state your name and position, please?

A. Roy M. Chapman, C-h-a-p-m-a-n, Coordinator of Fair Employment Practices for the Colorado Anti-Discrimination Commission.

Q. And how long have you been such Coordinator?

A. I was appointed on July 31, 1951.

Q. And you have been continuously engaged in that work since that time, have you?

A. Yes.

Q. When did you first learn that Mr. Green had applied to Continental Air Lines for a job as pilot?

[fol. 258] A. From a letter from Mr. Green dated August 3, 1957.

Q. Do you have that letter?

A. It is in our file and the received date is marked on there, too.

Q. Do you remember what that letter said, what the gist of the letter was, Mr. Chapman?

A. Essentially it was a description of Mr. Green's experiences when in Denver being interviewed for a job as a pilot, and in the letter he complained that he had been refused employment.

Mr. McClearn: Excuse me. I think the contents of the letter would be inadmissible.

Chairman Miller: Yes.

Mr. Sayers: I didn't want to get Mr. Chapman to identify it right now.

Mr. McClearn: I will stipulate to the authenticity of the letter, but I would object to the introduction of the letter on the ground that Mr. Green is present and personally has testified and that anything contained in the letter is secondary evidence.

Chairman Miller: I think that is true. I think the letter is admissible to the extent that a letter was received from Mr. Green but any self-serving statements would not be admissible as such, except insofar as he has testified to them.

Mr. McClearn: I think he has testified that a letter was [fol. 259] received and a complaint was made. Further information than that I think would be inadmissible.

Chairman Miller: Is there anything further in the letter that has not been testified to, Mr. Sayers?

Mr. Sayers: I don't believe so.

Chairman Miller: If not, I think, as Mr. McClearn said, we can stipulate to the effect that a letter was sent to the Commission.

The Witness: What date was it received?

Mr. Sayers: 8-8-57.

The Witness: August 8, '57. That is our office stamp, receipt stamp.

Chairman Miller: Then let the record show that a letter was received from the Complainant on August 8, 1957, addressed to the Fair Employment Practices Commission in Denver.

Mr. McClearn: So stipulated.

By Mr. Sayers:

Q. After receiving the letter from Mr. Green what did you do, Mr. Chapman?

A. I replied to the letter and enclosed what we call a preliminary complaint interview form for Mr. Green to fill out so that we would have some knowledge or some specific knowledge of his qualifications and his background. I, also, upon the basis of the information furnished in the letter of [fol. 260] August 3rd, Mr. Green's letter of August 3rd, I prepared a complaint in the proper form, enclosed that with a preliminary complaint interview form and also a letter to Mr. Green, explaining the purpose of the interview form and asking him to either sign the complaint, submit it if it covered the subject, or to make such corrections as were necessary and then to sign it, have it verified, and return it if he cared to file a complaint with the Commission.

Q. After the complaint was filed what did you then do?

A. I proceeded then to make some investigations as to Mr. Green's qualifications and followed up on his references that he had given, three different references from people who knew him, character references, and from people from various parts of the United States. I also set up an engagement to talk to Mr. Bell concerning the matter, who is Personnel Director of the Continental Air Lines.

Q. Will you tell us of your conference with Mr. Bell?

Mr. McClearn: Before Mr. Chapman testifies in answer to that question, I would like to make an objection, Mr. Chairman. It is our position that conferences between Mr. Chapman or members of his staff and representatives of the Respondent are not admissible at this hearing, as having been held in attempts to reach a compromise or settlement of a dispute between Mr. Green and the Respondent. I could make a further argument if you would like me to. There was correspondence on this point between the Respondent and Mr. Chapman in support of my argument, and I would like to have that. Perhaps I could make a preliminary inquiry of Mr. Chapman at this time.

Chairman Miller: All right. My own recollection of the law is, what we call the examining or investigating official may testify.

Mr. McClearn: I think it does say that he shall not do something except as a witness, if I recall the words.

Mr. Sayers: Section 6, Sub-section 7.

Chairman Miller: Section 6, Sub-section 7?

Mr. Sayers: Yes.

Chairman Miller: "The case in support of such complaint shall be presented at the hearing by one of the Commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the Commission in such case."

Mr. McClearn: I think it would—excuse me, I didn't mean to interrupt.

Chairman Miller: On the basis of that he would appear to be competent to testify as a witness.

Mr. McClearn: That inference could be drawn. I would like to lay this further foundation, then I will make my argument as brief as I can.

Chairman Miller: All right.

[fol. 262] By Mr. McClearn:

Q. Mr. Chapman, in the latter part of 1957 did you receive a letter from Continental Air Lines with reference to a proposed conference with representatives of Conti-

mental and asking or requesting that the conference and prior conferences be considered as having taken place by way of compromise or settlement and not be used in subsequent proceedings if any were to be held?

A. That was perhaps in December?

Q. Perhaps. I think it was.

A. After we had held two conferences.

Q. Did you receive such a letter?

A. Yes.

Q. Do you have a copy of that letter in your files?

A. Yes.

Q. May I have it, please?

Chairman Miller: Did you say after—

The Witness: After October 31. It was probably in December, might have been in November because we tried to get together, then we had to make some postponements. It might have been dated November.

Mr. McClearn: Mr. Binkley, may we stipulate that that letter, which I would like to have marked—perhaps we better do that first.

(Respondent's Exhibit No. 1 was marked for identification [fol. 263].)

The Witness: I should like to have that letter read.

Mr. McClearn: I will be glad to read it. I am reading from a letter to Mr. Roy M. Chapman, Coordinator, December 23, 1957—with your permission?

Chairman Miller: Yes.

Mr. McClearn: "Dear Mr. Chapman: We have your letter of December 16, 1957, scheduling a conference in your office on January 7, 1958, with respect to the complaint filed by Marlon D. Green. As previously advised, we will be glad to discuss this matter with the Commission at that time.

"There is, however, one point which we would like to have clarified prior to the meeting. We understand that the purpose of this meeting is to informally consider the positions of the parties in an effort to settle or compromise any differences by means of conference, conciliation and negotiation. For such a meeting to be of any value, the

persons present should engage in full and free discussion. In order that such a discussion may take place, we believe two things are necessary: First, that no stenographic or other recording of the discussion should be made; and second, it should be understood that nothing said by any of the persons present would be used in any way in any formal proceeding which may follow. In addition, certain notes were taken at our earlier meetings and it should be understood that those discussions took place in a conciliation [fol. 264] effort and will not be used in any subsequent proceeding.

"Since Mr. Green has filed a formal complaint with the Commission, it seems fairly clear that he has commenced legal action against Continental Air Lines, and it is for that reason we want to be sure we understand the purpose and effect of our meeting with the Commission. We do hope the proposed meeting can be held in the informal atmosphere suggested above, and that we can arrange for a satisfactory disposition of the matter. We intend to approach the meeting in that light and to use our best efforts to arrive at a solution acceptable to all concerned.

"Will you please confirm our understanding that the meeting will be conducted as suggested above?

"Yours very truly, Harrold W. Bell, Jr., Director of Personnel."

May it be stipulated, Mr. Binkley, that this is the letter which was received by your office, and Mr. Chapman's?

Mr. Binkley: Yes.

Mr. McClearn: May it be received in evidence? We offer it at this time.

Chairman Miller: Yes. That relates of course—I beg your pardon.

Mr. Manzanares: Was there any agreement to that, did Mr. Chapman agree to the stipulations contained in the letter?

[fol. 265] Mr. McClearn: I would like to bring that out, if I may.

By Mr. McClearn:

Q. Did you receive that letter, Mr. Chapman?

A. Yes.

Q. What did you do upon receiving the letter?

A. I replied to it.

Q. What did you reply?

A. I think it would be quicker just to read my reply.

Q. Did you understand the contents of the letter?

A. I thought I did.

Q. Did you understand from the letter that Continental Air Lines desired to have your discussions with them treated as confidential?

A. I don't know how to answer that. It is my understanding, however, that if this should ever come to a hearing, it was my understanding at that time, and still is, that I could testify to pertinent things which would substantiate our finding of probable cause for complaint.

Q. Notwithstanding the request contained in that letter?

A. As long as we didn't divulge anything that was of a business nature of the Continental Air Lines.

Q. In other words, you thought that Continental was interested in not revealing something in the nature of trade secrets or something like that?

[fol. 266] A. Information which was not generally given to the public.

Q. Now, in your discussions with Mr. Bell, it is true, is it not, that you told him those discussions were taking place in confidence?

A. Let's read my reply.

Q. I am not talking about your reply right now. I am talking about one of your earlier meetings with him. Didn't you tell him that?

A. In a discussion of that sort it was reasonable to expect that there would be some things said about business affairs of the company that shouldn't be admitted to the record in a hearing but which had indirect bearing upon this case.

Q. I am not sure I understand you, sir. Are you suggesting that you felt you could disclose matters detrimental to the company which would relate to Mr. Green's allegations but not outside of Mr. Green's allegations?

A. I thought I could testify to things that pertained to Mr. Green's allegations.

Q. Regardless of whether they were detrimental to the company or not?

A. Yes.

Q. Now, it is further true, is it not, Mr. Chapman, that you have a duty under the statute in the preliminary stages of such a hearing or such a proceeding to attempt to con-[fol. 267] ciliate, persuade and negotiate with the persons involved, both Complainant and Respondent?

A. The first step is to try to gather information from both, on behalf of the Complainant and on behalf of the Respondent, upon which he can make a determination as to whether or not there is probable cause for crediting the allegation. It is our job—it is my job as Coordinator to act in a quasi judicial position and not to take sides with either one. I gather facts.

Q. I appreciate that. But you do have the statutory duty to attempt to resolve matters such as this.

A. That is the next step. Then if probable cause is determined, then it is my duty to try to settle the matter by conciliation, persuasion and conference.

Q. And for that purpose you have a duty, do you not, to get together with the parties, particularly the Respondent?

A. That's right.

Q. And to discuss with them the complaint?

A. That's right.

Q. And attempt to persuade them to take a course of action which will solve the problem?

A. That's right.

Q. And you did so in this case?

A. Yes, sir.

Mr. McClearn: Do you want to have that marked, Mr. [fol. 268] Sayers?

Mr. Sayers: Yes.

Chairman Miller: Respondent's?

Mr. McClearn: I think that would be the Complainant's.

Chairman Miller: Complainant's Exhibit No. 8.

(Complainant's Exhibit No. 8 was marked for identification.)

By Mr. McClearn:

Q. Now, Mr. Chapman, I have here a copy of letter dated December 27, 1957, to Mr. Harrold W. Bell, Director of Personnel. I will read it if that is all right.

A. Yes.

Mr. McClearn: "Dear Mr. Bell: This acknowledges your letter of December 23, 1957 concerning our scheduled conciliation meeting on the Marlon D. Green Complaint.

"I concur with your request that this meeting shall be completely informal and unrecorded. I sincerely hope that we can arrive at a satisfactory settlement of the Complaint at this meeting.

"The Commission has designated me to represent it at the January 7th meeting; therefore, none of the Commissioners will be present.

"Very truly yours, Roy M. Chapman, Coordinator."

Would you care to stipulate that this was received?

The Witness: Yes, it was sent.

[fol. 269] Mr. McClearn: You stipulate you received it?

The Witness: I suppose Continental received it.

Mr. McClearn: Do you want to offer it?

Mr. Sayers: Yes. We want to offer in evidence Complainant's Exhibit 8, as a response to the letter in question.

Chairman Miller: Yes. You have offered this Respondent's Exhibit 1?

Mr. McClearn: Yes, sir.

Chairman Miller: If there is no objection, these will both be admitted.

(Respondent's Exhibit No. 1 and Complainant's Exhibit No. 8 were received in evidence.)

Mr. McClearn: I have just one or two questions of Mr. Chapman, then I will be through.

By Mr. McClearn:

Q. Mr. Chapman, did you thereafter hold a meeting with representatives of the Continental Air Lines?

A. Yes.

Q. Did you at any time during your conversation with any representative of Continental in connection with this matter advise them that you would be prepared or that you would testify at any hearing if held as to the conversations?

A. No, sir, and I don't recall ever having expressed that.

Q. But you do recall having expressed the statement that the matter was to be treated as confidential?

[fol. 270] A. In my reply there it says that I concur that there will be no recording of the conference.

Q. I am not talking about your answer to the letter. I am talking about your conversations with Mr. Bell prior to this exchange of correspondence.

A. Prior to that?

Q. Did you then tell him that the matter was to be treated as confidential?

A. Verbally, you mean in conversation?

Q. Yes, or state it however you like. I don't want to put words in your mouth.

A. Well, that would help. I can't recall any conversation to that effect.

Mr. McClearn: With your permission, I will state my objection, which is two-fold.

Chairman Miller: All right, sir.

Mr. McClearn: I have already stated my basic objection, which is that testimony from Mr. Chapman as to conferences with Continental representatives is inadmissible because the conversations took place in the course of a compromise or settlement of an existing dispute. The complaint in this case was issued on or about August 13, 1957, and these conferences took place thereafter. Mr. Chapman has a statutory duty to attempt to bring the parties after the dispute has arisen and after the complaint has been filed together, and in an informal atmosphere resolve, negotiate, [fol. 271] conciliate and persuade, and this he attempted to do as was proper.

Now, it is clearly contemplated as I read the Act, that this conciliation process to be effective must be treated confidentially, and that obviously if a Respondent or its representatives knows that any statement it makes can, if detrimental, be used against it, the purpose of the conciliation feature of the statute is of no effect because nobody will talk to the Commission or its representatives, and certainly in addition to that fundamental policy consideration, there is here the explicit expression by Continental's representatives prior to one meeting, asking not only, or seeking to clarify their understanding not only that the subsequent meeting but that the past meetings will also be treated in that same light so that the very purpose of this statute can be effectuated, and I submit to the Commission that unless that policy is adopted by it, your conciliation feature or phase of the statute will be meaningless and there will be no point in doing it.

The Witness: Would it be proper for me to ask a question?

Chairman Miller: Just a minute. I would like to discuss this a minute.

(Conference of Commissioners held outside the hearing room.)

Chairman Miller: The members of the Commission here [fol. 272] have examined Respondent's Exhibit 1 and the Complainant's Exhibit No. 8, together with what they consider to be the pertinent provisions of the law. Respondent's Exhibit 1 is a letter dated December 23, 1957, relating to a proposed conference between Roy Chapman, Coordinator and Harrold W. Bell, Director of Personnel of the Respondent, and requests that, first, no stenographic or other recording of the proceeding be made; second, it should be understood that anything said by any of the persons present would not be used in any way in any formal proceedings which may follow.

Mr. Chapman in his letter, Complainant's Exhibit 8, answers: "I concur with your request that this meeting shall be completely informal and unrecorded. I sincerely hope that we can arrive at a satisfactory settlement of the Complaint at this meeting."

This correspondence would forbid the introduction of any evidence relating to the meeting of January 7. However, the statute provides for the procedure and the duty of the Coordinator upon the filing of a complaint or even prior thereto; Section 6, Subsection 3: "After the filing of a complaint, the coordinator or commissioner shall make, with the assistance of the staff, a prompt investigation thereof, and if such investigating official shall determine that probable cause exists for crediting the allegations of the complaint * * *".

Subsection 7 of Section 6 provides that "The case in [fol. 273] support of such complaint shall be presented at the hearing by one of the Commission's attorneys or agents. The investigating official shall not participate in the hearing except as a witness, nor shall he participate in the deliberations of the Commission in such case."

Sub-section 7 contains the important provision that the investigating official may participate in the hearing as a witness. His duties seem to be two-fold. First, he has the duty of investigating, and then there are duties imposed upon him to attempt to eliminate such discriminatory or unfair employment practice by conference, conciliation and persuasion.

The Commission is of the opinion that these provisions of the statute permit the investigating official to testify as to facts relating to his investigation, not facts relating to conciliation. Although there may be a question as to whether or not he may not even testify as to those facts, at any rate, in connection with the objection that has been raised the Commission is of the opinion that no testimony is admissible with respect to the January 7 meeting but that testimony is admissible so far as the witness is concerned with respect solely to facts developed on his investigation, eliminating any evidence relating to efforts of conciliation or compromise. I hope that is clear.

Mr. McClearn: The ruling of the Commission is very clear. The line between the two is not quite so clear to me. [fol. 274] Chairman Miller: I agree with you it may take a differentiation, but yet to read the statute, which is, of course, unique, and having in mind, too, the background on

compromises, of course, the statute doesn't say "compromise", it says "conciliation", and efforts at elimination of an alleged practice, conciliation and persuasion. It does not speak of compromise of a disputed claim which normally would not be admissible, but it seems clear that, at least to the members of the Commission now, that the facts relating to the investigation by the investigating official are admissible. Otherwise, it would be pure surplusage to insert in the Act that the investigating official shall not participate in the hearing except as a witness.

Now, under the Act a member of the Commission may be an investigating official as well as the Coordinator or a member of the staff. In this case the Coordinator was designated as the investigating official and it is a little bit hazy to determine what he would be testifying to except as a witness if it didn't relate to facts developed in the investigation.

Mr. McClearn: I might state that our position with respect to that, Mr. Chairman, is that we don't challenge his competence to appear as a witness, for example, to testify to the fact that the complaint was received and matters of that nature which he has already testified about. Our objection is solely to his conferences with the Respondent [fols. 275-6] in an endeavor to resolve, conciliate or compromise, as you have it, the dispute.

Chairman Miller: Yes. As I say, that may be a little difficult to differentiate, but I think we'll have to take each question and answer as they develop and rule upon them as to whether or not this is an investigation or this is persuasion or conciliation in the words of the statute. It may sound like hair-splitting, yet that's the way we read the Act.

Mr. Westfeldt: If the Commission please, I am going to leave and Mr. McClearn is going to continue for Continental Air Lines. The only thing that I might have to add to that, that with respect to procedure before administrative bodies, to whatever extent the procedures before the National Labor Relations Board can be considered as a parallel in unfair labor practice cases, the Board and its staff are very, very careful that their field examiners

do not testify under any circumstances in hearings on unfair labor complaints, and I think that it is analogous. Of course, it is not exactly the same, but I think that on that basis the objection asserted by counsel in this area of conciliation and negotiation and persuasion should stand, and I assume that the Commission's ruling is in accord with that objection.

Chairman Miller: Yes, it is. Having in mind, too, other procedures before other administrative bodies, not only the National Labor Relations Board, the proceedings have been subject to considerable abuse. People are sitting in [fol. 277] investigative and judicial capacities as well, and I think there have been remedial Acts designed to correct that situation. But here it is the Commission's ruling that anything relating to the facts developed by investigation, even though developed by the Commission's investigator, are admissible.

Mr. Westfeldt: I have nothing further to say.

Mr. McClearn: Mr. Chairman, just as a matter of procedure as a part of our case we are prepared to have testimony from our people as to what Mr. Chapman said. Now, I appreciate that the Commission has ruled and I am not asking that it change its ruling. Do you see any reason why we should present that testimony at this time other than—

Chairman Miller: As a matter of procedure, if you would prefer, we can do it this way. Assume we reserve our ruling on Mr. Chapman's testimony and proceed with whatever other evidence there may be, and then you present your witnesses and do it that way, too.

Mr. McClearn: That would be fine.

Chairman Miller: If you would rather do that.

Mr. McClearn: I am prepared to do it now or at the Commission's convenience.

Chairman Miller: Why don't we do that now, if that is agreeable to you, Mr. Sayers?

Mr. Sayers: That is all right with me.

Chairman Miller: Let Mr. McClearn present his witnesses.

[fol. 278] Mr. Sayers: Just as well clear it up.

Mr. McClearn: All right, and it is understood this testimony relates just to this point.

Chairman Miller: Yes.

(Witness temporarily excused.)

HARROLD W. BELL, JR., called as a witness on behalf of the Respondent, was duly sworn and testified as follows:

Direct examination.

By Mr. McClearn:

Q. Would you state your name, please, and address?

A. Harrold W. Bell, Jr., 5634 Montview Boulevard.

Q. What is your occupation, Mr. Bell?

A. Vice President, Personnel, Continental Air Lines.

Q. Mr. Bell, during the months of September, October, November 1957, did you have conversations with representatives of the Colorado Anti-Discrimination Commission relative to the complaint of Marlon D. Green?

A. Yes.

Q. With whom did you have those conversations?

A. The Chairman, Mr. Chapman—

Chairman Miller: Not the Chairman.

A. Not the Chairman. Mr. Chapman, the Coordinator, and Mr. Binkley.

Q. Where did these conversations take place?

A. They took place, one, I am recalling from memory, in my office, and the other, I believe in this room.

[fol. 279] Q. Which is the office of the Commission?

A. The office of the Commission.

Q. Who was present at the first conference, if you can recall?

A. Mr. Chapman, Mr. Binkley, I was present of course, Mr. K. C. Sorby, the Employment Manager.

Q. Of Continental Air Lines?

A. Of Continental Air Lines.

Q. At that time and place what, if anything, did Mr. Chapman or Mr. Binkley say with respect to the subsequent use of your conversations with him?

A. We were given to understand that the conversations were confidential, that this was an effort to mediate, to adjust the dispute, and to resolve Mr. Green's complaint to the satisfaction of all parties.

Q. How did this specific conversation arise?

A. Mr. Chapman has a very interesting machine that takes characters, I believe, perhaps it is Braille, and I inquired if that was being transcribed in any way, it being my understanding it was a mediatory session, and was told no, just notes of one sort or another were being taken. I had no reason to believe that anything that was being taken down would be used.

I'd like to say here there was nothing of great confidence discussed that I believe would be in violation—well, not [fol. 280] violation, that couldn't be used.

Mr. Sayers: May I ask a question here, please? What date was this meeting that you speak of?

The Witness: In September, Mr. Sayers. I don't have the exact date. We have it available.

Mr. Sayers: September '57?

The Witness: September '57, yes.

By Mr. McClearn:

Q. At the beginning of your conversation with Mr. Chapman and Mr. Binkley, was the purpose of the meeting explained to you by either of them, and if so, in what manner?

A. That was an effort to resolve a complaint brought by Mr. Green to inquire as to the facts as they were available, and as I say, to try to resolve this complaint.

Q. Were you informed by either Mr. Chapman or Mr. Binkley that Mr. Green had filed a formal complaint against Continental with the Commission?

A. Mr. Chapman so informed me.

Mr. McClearn: That's all I have, Mr. Sayers.

Cross examination.

By Mr. Sayers:

Q. Was it your understanding at that time that the meeting was to be confidential?

A. Yes, Mr. Sayers.

Q. Who so indicated?

A. Mr. Chapman himself.

[fol. 281] Q. That was at the September meeting that you had that understanding?

A. Yes.

Q. What about subsequent meetings?

A. And all subsequent meetings likewise. The only other meeting I believe was held in this office in perhaps early December. I don't have that date either, perhaps you do. But the meeting was held here and it was my understanding that also was exploratory, mediatory, in an attempt to resolve the complaint, and it was a confidential meeting.

Chairman Miller: Did Mr. Chapman say at any time they were investigating this complaint?

The Witness: I am relying on memory, Mr. Miller, but it is my belief that is what he said, they were investigating, exploring the facts.

Chairman Miller: Didn't you discuss facts with him with respect to Mr. Green's capabilities?

The Witness: Yes.

Chairman Miller: Was there anything said at that time with respect to Mr. Green's either being capable or not being capable?

The Witness: Yes.

Chairman Miller: What was said with respect to his capabilities?

The Witness: That according to the flight check given [fol. 282] him—

Mr. McClearn: I wonder, Mr. Miller, if that isn't going beyond this specific inquiry. Isn't that getting into the merits of the testimony?

Chairman Miller: Well, it is getting into the questions of fact, that is true. We are having a preliminary inquiry,

that's right. I think Mr. Bell's evidence shows that it was partially investigative.

Mr. McClearn: I don't propose to make further argument. That's all the testimony I have from him.

Chairman Miller: All right.

(Witness excused.)

Chairman Miller: Mr. Bell was the only one in that respect?

Mr. McClearn: Yes, sir, that's all.

Chairman Miller: Call Mr. Chapman with respect to this conversation.

ROY M. CHAPMAN, resumed the stand, was examined and testified further as follows:

Chairman Miller: You have been sworn, Mr. Chapman. You have heard Mr. Bell's testimony with respect to the meeting which you held here. You had two meetings with him prior to December 1957. Have you heard that testimony?

The Witness: Yes, sir.

Mr. McClearn: In order to expedite the hearing, may I [f6l. 283] have a standing objection to the testimony of conversations so I need not make them each time?

Chairman Miller: You mean these conversations between Chapman and the representatives of the Respondent?

Mr. McClearn: Yes.

Chairman Miller: Yes.

Did you answer, Mr. Chapman?

The Witness: Yes, sir. I answered "Yes".

Chairman Miller: Is that statement entirely correct?

The Witness: I don't recall that at the first meeting that we had with Mr. Bell and Mr. Sorby in Mr. Bell's office that I stated that that was confidential. There were parts of it no doubt that were, that would be considered as confidential, but that was an investigation. That was the beginning. We had no grounds at that time upon which to conciliate.

Chairman Miller: Would you state whether or not you told Mr. Bell that this was an investigation?

The Witness: I can't imagine that I didn't. Ordinarily, if this is of any value, at the first meeting with the Respondent—

Chairman Miller: No, you would have to confine yourself to this particular conversation.

The Witness: I would say yes.

Chairman Miller: And did you discuss any facts relating to Mr. Green's complaint with Mr. Bell at that time?

[fol. 284] The Witness: I advised him of the allegations.

Chairman Miller: Did you say that anything said at that time would be held in confidence?

The Witness: I don't recall saying that.

Chairman Miller: I think, Mr. Sayers, you may inquire as to facts.

Mr. Sayers: As to the facts of the first meeting?

Chairman Miller: Developed by investigation.

Direct examination.

By Mr. Sayers (continued):

Q. Mr. Chapman, after the complaint was made, what did you do?

A. I made arrangements to meet Mr. Bell at his office to get the Respondent's side of the story.

Q. In that effort were you trying to find probable cause for the filing of the complaint?

A. I was trying to gather facts upon which I could base a determination of whether or not there was probable cause.

Q. Now, I would like to ask you what those facts were that you discovered. I don't know whether we can under this procedure now.

A. Well, several of the facts have already been testified to.

Chairman Miller: May I suggest, you must limit yourself, of course, only to facts relating to the Plaintiff's or the Complainant's allegations of discrimination based upon [fol. 285] his capability to be employed by the Respondent.

The Witness: I shall try to do that.

Q. First, to get started off again, at this first meeting can you give us the approximate date, Mr. Chapman?

A. It was September 10, 1957.

Q. And with whom did you confer?

A. With Mr. Harrold W. Bell, Jr., and Mr. Kenneth C. Sorby, employment manager.

Q. And in your consultation with whom did you speak, each of them or with just one of them primarily?

A. Principally with Mr. Bell.

Q. Can you tell us now, give us the gist of what occurred at that meeting, limiting it, as has been directed by our Chairman?

Chairman Miller: Only to facts relating to the Complainant's qualifications.

A. In respect to qualifications I asked Mr. Bell if Mr. Green, the Complainant, was a qualified pilot, and he answered in words very much like this, "Hell, yes, with a record like that you couldn't say he was anything but qualified."

Q. Then what developed further?

A. And then in our discussion Mr. Bell expressed three fears.

Mr. McClearn: Excuse me. Are these facts relating to qualifications?

[fol. 286] Chairman Miller: No, I don't think the fears are admissible. I think the facts related to Mr. Green—

The Witness: These statements were made in connection with Mr. Green by Mr. Bell.

Chairman Miller: All right.

A. Mr. Bell repeated—

Mr. McClearn: Well, now, I certainly don't want to be objectionable any more than I have to, but are we dealing with facts as applied to Mr. Green, or are we getting into some extraneous area having to do with the subjective feelings of some person?

Chairman Miller: No, I think we are dealing with the fact relating to the question, this issue of whether or not the Complainant was discriminated against because he said he was a Negro in this application for position as a commercial airline pilot, and I think the facts, any facts, related

to his qualifications and the Respondent's attitude toward this particular applicant for the job, which bear upon his employment or nonemployment, whatever the reason may be, whether it was because of no positions available or adverse economical conditions or anything, but the facts that Mr. Chapman was investigating.

Mr. White: I would like to ask Mr. Chapman a question.

Mr. McClearn: Let me just say that I don't see, then, if that be the case, what areas would be excluded from the [fol. 287] testimony, because—

Chairman Miller: Well, the areas of conciliation or persuasion, only those.

Mr. McClearn: It seems to me that what Continental's representatives said fall directly within that area.

Chairman Miller: No, if Continental's representative said this man is not qualified, that is one of the facts relating to the issue in this case; if Continental's representative said this man is qualified, that is a fact bearing on the issue. The next question is, if he was qualified, what fact was there which prevented his employment? He was not employed. What was the fact?

Mr. Manzanares: Mr. Chairman, are we to consider the matter of qualifications regarding employment to cover not merely the mechanical operation of a machine? It must be the area of qualification itself, I believe, as far as Continental is concerned, and I am not trying to tell them what their qualifications are, but it must cover more than the mere checkout flying time. That is what we want to get to there.

Chairman Miller: Those are the questions of fact by which we are limiting Mr. Chapman's testimony.

Mr. White: I would like to ask Mr. Chapman, was there any discussion on problems that would be involved in hiring a Negro as a pilot?

The Witness: Yes.

[fol. 288] Mr. White: Can you tell us what problems were discussed?

Mr. McClearn: When you raise the question of problems, Mr. White, I submit you are in the area of negotiation and conciliation and persuasion.

Mr. White: I think he went out there to investigate why he wasn't hired.

Mr. McClearn: I won't say any more.

Mr. White: The testimony was that he was qualified. I want to know, if he is qualified, what other problem was there and why he wasn't hired. Now, they must have discussed those problems in the investigation.

Chairman Miller: Yes, you may testify to that.

The Witness: Are you ready?

Chairman Miller: Yes.

A. During that interview on September the 10th one of the points emphasized by Mr. Bell was that there was a fear that there could be no cockpit harmony between a Negro pilot—or a White pilot and a Negro copilot, that it might lead to frictions which would become hazardous to the operation of the aircraft.

Another point of fear that was brought up was they might run into difficulties in housing a Negro at the end of a run. For instance, in Chicago or Los Angeles or some of their terminals in Texas and also in eating places, if the [fol. 289] Negro person hired insisted upon the same, and equal accommodations with the other flight personnel.

The third fear was expressed that although the company has the right to hire whomever it pleases on a one-year probationary period, that at the end of that year's period there might be difficulty in a Negro pilot's being admitted to the Air Line Pilots' Association, which is a labor union, and that since membership in the A.L.P.A. is dependent upon the rating given the applicant for membership by the pilot, that the pilots might not give him a good rating—or give a prejudicial rating, rather, and that that might bring about labor troubles.

And another point—I based my opinion of probable cause largely upon those fears, those three fears that were expressed, and also upon the fact that Mr. Green was required, or requested, rather, to enter "Negro" on the application form although it was an obsolete form. In connection with qualifications I might add this, that the question of personality characteristics and appearance were also discussed, and that there was no contention made that

Mr. Green's personality characteristics and physical appearance were against him. It was also admitted that he was within the age limit of the company and within the size limit, height and weight.

By Mr. Sayers:

Q. Can you think of any other items that should be brought to the Commission's attention?

[fol. 290] A. Under the limited circumstances I don't think of any others.

Q. It limits it very much.

Chairman Miller: Are you through, Mr. Sayers?

Mr. Sayers: I wanted to ask Mr. Chapman this question:

Q. Now, the second and third conferences that have been mentioned, were they conferences of conciliation?

A. Primarily.

Q. At this first meeting, was the policy of the company discussed?

A. Yes.

Q. And the policy of the individuals hiring, were they discussed?

A. The individuals who did the hiring, as I understand it, don't make policies. At that time I was given a copy of the Continental Air Lines' Employment Manual, which has a statement of its employment policies and its procedure in hiring.

Q. Is there anything in that Manual that would indicate discrimination of minority groups?

A. The policy statement is a very good policy.

Mr. McClearn: I wonder, if Mr. Chapman has that, if he couldn't just introduce it.

Chairman Miller: Yes, just introduce it if you have it.

[fol. 291] (Complainant's Exhibit No. 9 was marked for identification.)

Mr. Sayers: I don't know how we will have Mr. Chapman identify it.

Mr. McClearn: We will stipulate it.

Chairman Miller: Stipulate this may be read in the record.

Mr. Sayers: And those sections applicable would be Sections A and C.

Chairman Miller: Shall I read them?

The Witness: I would like to have my memory refreshed.

Chairman Miller: This is Continental Air Lines, Inc., General Policy Manual, Part 1—Employment.

"A. Employment policy. Applicants for employment will be considered solely on the basis of fitness and ability for the work as determined by such factors as character, skill, intelligence, and physical qualifications."

Then you say "C"?

"C" is "Responsibility for Selection."

The Witness: I remember what that is.

Chairman Miller: "The department head or his designated representative will select from the applicants referred to him by the employment manager the individual best suited for the position."

Mr. Sayers: We would like to offer that.

[fol. 292] Mr. McClearn: No objection.

Chairman Miller: It will be admitted.

(Complainant's Exhibit No. 9 was received in evidence.)

By Mr. Sayers:

Q. Mr. Chapman, referring to what has just been read—was there anything said at your investigative conference that would indicate that Mr. Green did not meet any of the requirements set out?

A. No. According to all the information I could gather he met everything complete.

Mr. Sayers: Do you have any questions?

Chairman Miller: No. Mr. McClearn?

Mr. Manzanares: I do. Go ahead.

Chairman Miller: Mr. McClearn.

Cross examination.

By Mr. McClearn:

Q. At the meeting on September 10, 1957, Mr. Chapman, Mr. Sorby told you, did he not, that Mr. Green was one among 14 applicants for a limited number of positions?

A. I was told that by either Mr. Bell or Mr. Sorby.

Q. And you were further told, were you not, that of the 14 applicants 4 were selected for employment?

A. Yes.

Q. And you were further told, I believe, that of those who were not hired at that time a number of reasons entered into it, as to the reasons why they were not hired at that time?

[fol. 293] A. I was told that the 4 selected were the ones that they thought they wanted more than they did the others.

Q. Now, Mr. Bell also told you at that meeting, did he not, that it had come to his attention that Mr. Green had filed a number of other lawsuits just prior to your meeting?

Mr. Sayers: We object to that.

Mr. McLearn: I am not trying to establish the fact.

Chairman Miller: No, I think that is admissible.

Mr. Sayers: Objection withdrawn.

A. Yes, sir.

Q. And when he was discussing these three fears, as you phrased them, he indicated to you, did he not, that that represented his personal opinion?

A. I don't know whether he indicated it or not, but I would agree with that, that it was his personal opinion.

Q. And Mr. Bell further at that meeting indicated to you that Continental customarily interviews a considerable number more applicants than there are positions to be filled, did he not?

A. Yes.

Q. And that it customarily does not hire a good number of people at interviews?

A. Yes.

Q. In your testimony you stated that you didn't recall [fol. 294] saying at this first meeting that the matters discussed were to be treated as confidential. Now, you don't mean to say, do you, that you couldn't have said that?

A. I could have said that, and there were some matters came up that were confidential because we had a friendly relationship and there were some off-the-record viewpoints taken.

Q. Which still exists, I hope?

A. I hope so. I might add this, it is true that I was told there were four applicants selected. I was also told that they were recruiting for some 14 or 15 pilots at that time.

Q. In September?

A. I was told that in September, that in June they thought they were going to fill 14 or 15 new positions with new pilots, and they went ahead—I was told that they went ahead in July and screened another considerable number, sixty applicants, and out of the sixty, as I recall, ten were approved for interview and two were selected, because about that time they got word that instead of fourteen or fifteen pilots to be employed there would be three or four.

Mr. McClearn: I think that's all, Mr. Chairman.

Chairman Miller: Did you have questions?

By Mr. Manzanares:

Q. I would like to ask Mr. Chapman, if in the first investigation meeting on September 10 you advised Mr. Sorby and the other gentleman that your investigation that you [fol. 295] were conducting then was necessary so that you could determine whether or not probable cause would exist for crediting the allegations of the complaint.

A. I said words to that effect, yes.

Mr. Sayers: ~~I would like to ask one other question.~~

Redirect examination.

By Mr. Sayers:

Q. Mr. Chapman, did either Mr. Bell or Mr. Sorby say they would not hire Mr. Green because he was a Negro?

A. Not on September 10.

Mr. Sayers: May I follow that with another question?

Chairman Miller: Depends on when.

Q. Mr. Chapman, was such statement generally made?

Chairman Miller: If you are relating the testimony to any conferences prior to this January meeting, I think it is proper, but I don't think you can get into that one.

Mr. Sayers: Let me rephrase my question?

Q. Mr. Chapman, were you ever told that Continental would not hire Mr. Green because he was a Negro prior to the January meeting that you had with him?

Mr. McClearn: I think it is already in the record that I have an objection to this whole line of inquiry.

Chairman Miller: Yes, sure.

A. I have no recollection of that, of what was said about that during that specific period of time.

Q. Would you say that such was indicated?

[fol. 296] Mr. McClearn: That is objectionable, I believe.

Chairman Miller: No, you should be specific.

Mr. Sayers: That's all.

Chairman Miller: Anything further?

That is all, Mr. Chapman.

(Witness excused.)

Chairman Miller: Mr. Sayers?

Mr. Sayers: Mr. Binkley.

Chairman Miller: Is it agreeable to continue, say, until 5 o'clock, approximately?

Mr. McClearn: At your convenience.

JOHN I. BINKLEY, called as a witness on behalf of the Complainant, was duly sworn and testified as follows:

Direct examination.

By Mr. Sayers:

Q. Mr. Binkley, will you state your full name and position, please?

A. John I. Binkley, Assistant Coordinator for the Anti-Discrimination Commission.

Q. How long have you been so employed?

A. It will be three years in July of '58.

Q. Mr. Binkley, did you accompany Mr. Chapman on any of the conferences, investigative conferences, that were held with the representatives of Continental Air Lines?

Chairman Miller: I would fix the dates, Mr. Sayers.

A. The conference of September, the year is '57, September 10, I was present at that meeting, yes.

Q. Who attended that meeting, Mr. Binkley?

A. Mr. Harrold Bell, Mr. Kenneth Sorby, Mr. Roy Chapman and myself.

Q. Will you give us a brief summary as to what transpired at that investigative hearing on September 10, 1957?

Chairman Miller: Only with respect to facts developed in your investigation or we will get an objection of counsel for the Respondent.

A. The meeting was, in my estimation, one to investigate, find out information from the Respondent regarding the complaint, and we discussed Mr. Green, why he had not been hired, and Mr. Bell pointed out that there were factors involved which made it very difficult for Continental Air Lines to hire Mr. Green. Primarily they were the problem that might occur regarding cockpit harmony that might never be achieved with a Negro copilot and a White pilot, or vice versa, the difficulty Mr. Green might have in getting membership in a labor union known as the Air Lines Pilots' Association, the difficulty Mr. Green might have in obtaining accommodations at the end of flights and during flight and that sort of thing, and the problem that he had become a national figure which Continental Air Lines didn't want to have anything to do with. He recognized that this is a problem, Negroes becoming airline pilots. He was in complete sympathy with the fact that something needed to be [fol. 298] done about it but felt that this should be done by the larger airlines rather than the small ones or the small airlines operating exclusively in the North, that it would be easier for the integration in airlines of those two types.

That, I think, is the gist of it.

Q. Did you discuss at this meeting about Mr. Green's ability in the link trainer, how he had reacted, his qualifications as a pilot, was that gone into?

A. The statement was made by Mr. Bell and Mr. Sorby both, that Mr. Green was qualified, there wasn't any question about his skill and ability as a pilot, and as to how well he had completed his check in the DC-3 flight or in a link

trainer, I am not sure whether they qualified it. They just said that he was satisfactory.

Q. Did they indicate whether Mr. Green had sufficient flying hours according to their standards and requirements?

A. I am not sure without referring to a memo made after that, whether or not the actual hours were discussed. It was discussed that Mr. Green more than met the minimum qualifications, and as to the number of hours then gone into, I don't recall that.

Q. In the meeting of September 10 was it discussed whether or not Continental knew that Mr. Green was a Negro before they had him come there for an interview?

A. They told us that they did know that he was a Negro, [fol. 299] yes.

Q. Did they say how they found it out?

A. Yes, they showed us an application form which had the word "Negro" written into the space marked "Race".

Q. And was indication made as to who had written in the word "Negro"?

A. No.

Q. There was nothing said who had written the name in?

A. Not to my recollection.

Q. Was anything said about Green's personality, how he met the personality requirement?

A. Mr. Bell had not met Mr. Green. Mr. Sorby had met him, and of course qualifying the statement with the short period of time that he had spent with Mr. Green he felt that he had a nice personality, at least nothing apparently negative appeared in the period of time they were together.

Q. Was anything said at the September 10 meeting about objections of the passengers which they carry to having a Negro pilot or copilot?

A. That was brought up as a possible problem, it might occur if they hired a Negro pilot or copilot.

Q. During this meeting of September 10 was anything said about the others that had taken tests, as to whether they were better qualified than Green, or whether Green was better qualified than they?

[fol. 300] A. No, I don't believe so. It was just understood that Green was eminently qualified with the experience he had had while an Air Force pilot.

Mr. Sayers: I believe that's all.
Chairman Miller: Mr. McClearn.

Cross examination.

By Mr. McClearn:

Q. You also heard Mr. Bell say that a number of other pilots, 14, I think, had been interviewed and 4 selected at that same time as Mr. Green?

A. Yes.

Q. And you also heard Mr. Bell, or I would like to ask you, Mr. Bell indicated, according to your testimony, that Mr. Green had become a national figure and Continental didn't want to become involved in the controversy, were those your words?

A. Something to that effect.

Q. And he was referring, was he not, to the fact that Mr. Green had filed a number of complaints against other persons?

A. Yes, I suppose so.

Q. Now, with respect to this—

Mr. Green: May I ask a question?

Chairman Miller: No, not now.

Q. With respect to the problem of accommodations, was the fact mentioned that two of Continental's domicile bases are located in the State of Texas?

A. Some were referred to, I wouldn't be sure of the [fol. 301] number now.

Q. Would it be your understanding, or was it your understanding at the time of this meeting that Mr. Bell was giving you his personal opinions? Let me phrase that differently, Mr. Binkley. He did not indicate, for example, that he had made any analysis or examination of the Union contract or Union attitude toward this, did he?

A. I'm not sure about that.

Q. You don't know.

A. No, I can't answer the question definitely one way or the other. It was discussed. As to the basis upon which he based his opinion, I am not sure.

Q. Now, it is true that you told or Mr. Chapman told Mr. Bell that a formal complaint had been filed against Continental Air Lines?

A. Yes.

Q. And I suspect it is further true that at the beginning of your conference you probably explained the nature of the law and what you were talking about, didn't you?

A. That's right.

Q. And you probably either explained or it was understood that there were certain sanctions that could be imposed against Continental if it was found to have violated the law, isn't that true?

A. I would say that we didn't refer to the sanction.

[fol. 302] Q. You did explain at least in general terms the purpose and effect of the Anti-Discrimination law?

A. Yes.

Q. And it is further true, is it not, that in discussing—you say Mr. Bell made certain statements as to problems that he could see. That wasn't in the nature of a speech or recitation by Mr. Bell but it was in the give-and-take of conversation with you and Mr. Chapman, was it not?

A. It was in a conversation, that's right.

Q. And it is further true, is it not, that when Mr. Bell would mention one of these factors about which you have testified, you or Mr. Chapman would seek to point out why that wouldn't be a problem, or you would attempt to minimize the effect of that problem, isn't that true?

A. We might have given him some facts in what we would consider a comparable situation.

Q. In other words, you attempted to persuade him, as it is your duty to do, that certain of these possible problems don't exist or are magnified out of proportion, isn't that part of what you did?

A. A very minor part of it. We were there to ask questions and to find out answers.

Mr. McClearn: Nothing further, Mr. Miller.

Chairman Miller: Any other questions?

Mr. White: I just wanted to ask one question.

[fol. 303] During all this discussion, only Mr. Green was discussed, is that right? I mean he wasn't generalizing, he was in there investigating Mr. Green only?

The Witness: That's right.

Mr. Sayers: Mr. Chairmán, I would like to ask this for a point of information. We are limited in our questions to just the one meeting of investigation, is that correct?

Chairman Miller: Just the investigation, yes, sir.

Mr. Sayers: Just the meeting of investigation. I might ask Mr. Binkley this question.

Redirect examination.

By Mr. Sayers:

Q. How many meetings of investigation did you have, Mr. Binkley, with Continental Air Line representatives?

A. Two.

Q. What was the date of the second meeting?

A. January 16, 1958.

Chairman Miller: That, of course, is not admissible under the basis of the correspondence between Continental and Mr. Chapman.

The Witness: Purely investigative.

Chairman Miller: Not admissible anyway.

Mr. Sayers: That's all.

Chairman Miller: That's all.

(Witness excused.)

Chairman Miller: We will take a five-minute recess.

[fol. 304] (Recess taken.)

Chairman Miller: Shall we proceed, Mr. Sayers?

Mr. Sayers: Mr. Kammerer, will you stand and be sworn?

EDWARD J. KAMMERER, called as a witness on behalf of the Complainant, was duly sworn and testified as follows:

Direct examination.

By Mr. Sayers:

Q. Will you state your name and position, please, your full name?

A. My full name is Edward J. Kammerer.

Q. What is your job?

A. I am a farmer, I work with my father in South Dakota.

Q. Are you acquainted with Marlon D. Green, the Complainant in this case?

A. I am.

Q. And how long have you known him?

A. I have known Mr. Green since 1951, somewhat over seven years.

Q. What was the occasion of your meeting?

A. I met Mr. Green at the conclusion of a sociology class, I believe, an upper division sociology class at the University which I was attending. Mr. Green, I think the occasion under which he was present there at that time, he had been invited by the professor to talk before the student body.

Q. And what was the University?

A. Loyola University of the South in New Orleans.

[fol. 305] Q. Do you know of Mr. Green's flying experience personally?

A. Well, I do to this extent. Well, my home is next to Ellsworth Air Force Base at Rapid City and has been there for some time before Ellsworth Air Force Base was established. I have had opportunity to observe Mr. Green in flight, you know, from a layman's viewpoint. I know that he does fly.

Q. Do you know that he gets along with his pilots and copilots that he works with, flies with?

A. Well, I have in my personal letter files a letter from Mr. Green, in one instance telling of—

Chairman Miller: Do you have the letter, Mr. Kammerer?

The Witness: I have the letter, yes.

Chairman Miller: Here?

The Witness: It is in my automobile outside. I didn't think that it was required to have it at this time.

Chairman Miller: You say the letter is from Mr. Green?

The Witness: From Mr. Green telling of his invitation and his having gone to the farm or home of one of his fellow crew members for a couple of weeks, a week or a couple of weeks, I believe it was. I had met some of Mr. Green's flying mates on one occasion at Ellsworth Air Force Base.

I recall a fellow officer in the Air Force of Mr. Green's [fol. 306] whom I knew before I knew Mr. Green, a White Southerner, who to this day, as far as I know, has not changed his attitude on race and integration when I discussed them with him but who said this to his brother-in-law who was a roommate of mine at the University—

Mr. McClearn: Excuse me, Mr. Kammerer.

The Witness: Yes.

Mr. McClearn: I would wish to object to this testimony.

Chairman Miller: Yes. While, of course, the rules here, as I said before, the Commission is not bound by the strict rules of evidence prevailing in courts of law or equity, I think this is going pretty far.

Mr. Sayers: I just wanted to show by this witness that Mr. Green did get along with those people with whom he worked. That was the primary purpose of calling this witness, that he was affable and could work—

Chairman Miller: By reference to letters that Mr. Kammerer has outlining a conversation with Mr. Green, he is going too far.

The Witness: I am sorry, but I understood my position was to give direct reference.

Chairman Miller: That is perfectly all right, but we are bound by the rules here.

The Witness: Yes, of course.

By Mr. Sayers:

[fol. 307] Q. Mr. Kammerer, did you send to the Anti-Discrimination Commission here a letter of recommendation for Mr. Green?

A. I did so.

Q. And of course that recommendation was favorable?

A. As I remember it, it was.

Mr. Sayers: We have here the letter of recommendation which Mr. Kammerer has sent to the Commission, showing Mr. Green's qualifications and character reference.

Chairman Miller: Do you want to have him identify the letter, the statements contained in this? Probably that is the best way to get it in.

By Mr. Sayers:

Q. I will have you examine this instrument and tell us first what it is, then I will introduce it.

A. This evidently and surely has my signature on it, a letter requesting character recommendations from me to the Colorado Anti-Discrimination Commission, Denver, Colorado.

Mr. Sayers: I would like to have this marked as Complainant's Exhibit No. 10.

(Complainant's Exhibit No. 10 was marked for identification.)

Q. I will ask you to examine Complainant's Exhibit No. 10 and ask you if this is your signature.

A. It is so.

Mr. Sayers: I wish to offer this in evidence.

[fol. 308] Mr. McClearn: I will object on two grounds. It seems to me the letter purports to be a character reference, which is certainly not an issue under the pleadings in this case.

The second ground for my objection is that if the evidence were otherwise admissible, which we do not think it is, the witness is present and can testify personally without need for reference to a previously written document.

Chairman Miller: I think that's right. He can testify, if you want to ask him about these various items on the back. However, I think this, if you withdraw the objection I think the Commission can consider its own appraisals on the basis of the issues in the case, only in the interest of time, that's all.

Mr. McClearn: Do I understand, then, that my first objection would be overruled?

Chairman Miller: No, I think probably your objection is good, but I was hoping maybe we could save time.

Mr. McClearn: I would stipulate that that could be admitted in evidence except for the fact that I don't believe character evidence is appropriate or material to this inquiry, whether by word of mouth or in written form.

Chairman Miller: Well, unless character may become material here with respect to the Complainant's qualifications.

Mr. McClearn: I would say this, Mr. Chairman, then, that would properly come in by way of rebuttal, and I certainly [fol. 309] wouldn't ask Mr. Kammerer to stay if he doesn't choose to stay. I will say that if we raise that issue I will stipulate this may be used in rebuttal.

Mr. White: According to the employment letter it says they would be employed according to their character, skill and physical qualifications. Not knowing whether or not somebody would say he didn't have the proper character, I would assume this would be good evidence, too. Like you say, I suppose it would be best to come in if it is challenged.

Chairman Miller: I think you could simplify it by simply asking what his opinion is of Mr. Green's character.

Q. What is your opinion of Mr. Green's character as you have known him?

A. Excellent.

Mr. Sayers: I think that's all.

Mr. McClearn: No cross-examination.

(Witness excused.)

Mr. Sayers: I will call Mr. Green.

Chairman Miller: How long will your case take, Mr. McClearn? Is it possible you could complete this afternoon?

Mr. McClearn: No.

MARLON DEWITT GREEN, having been previously sworn, was recalled and testified further as follows:

Direct examination.

By Mr. Sayers:

Q. I should like to ask, Mr. Green, in your experience [fol. 310] as a pilot how have you gotten along with the pilots and copilots with whom you have had to work?

A. I think, if I may, I would like to preface this by saying that in my military experience I have flown a total of approximately 3,000 hours. Of that 3,000, approximately 2900 have been in multiengine equipment, in most cases requiring a copilot or some other crew member, and during that time, as my record will show, I have crashed no airplanes for any reason. Further, none have been crashed for reasons of crew disharmony. On the contrary, I feel that my relation is borne out by my evaluations of conduct and performance as a military officer and that the objective fact that these years of flying, these hours of flying, have been accomplished in a safe and exemplary manner perhaps will answer that question satisfactorily.

Mr. McClearn: Excuse me at this point. I am going to get awfully unpopular, I am afraid, but I do object to that testimony on the ground it is not material and is self-serving. Again, it is properly brought out in rebuttal if we challenge Mr. Green's ability to get along with his fellow citizens.

Chairman Miller: Yes. I think the weight of it can be determined by the Commission, too, considering the fact that it is a self-appraising statement.

Mr. Sayers: It has been suggested that there would not be cockpit harmony if Mr. Green was employed. I am simply trying to show that Mr. Green has worked with other [fol. 311] pilots and copilots and has gotten along with them, has not crashed any planes as a result of working with someone of a different race.

That's all, Mr. Green.

(Witness excused.)

Chairman Miller: Then if you have no further testimony tonight, Mr. Sayers, we might as well adjourn until 10 o'clock tomorrow morning, is that agreeable?

Mr. McClearn: At your convenience.

Mr. Manzanares: Will it be agreeable if I do not show up until approximately noon? I am sure you can go ahead.

Chairman Miller: By noon we may be through.

Mr. Manzanares: I have a chore I can't get out of, pallbearer at a funeral. I will come in as soon as I can.

Chairman Miller: The evidence will be available to you, anyway, the transcript.

Then if there is nothing further at this time we will adjourn until 10 o'clock tomorrow morning.

Mr. McClearn: Mr. Miller, I am not familiar with the Commission's procedure, but I am quite concerned about the possibility of people going out and coming back and hearing portions of the testimony.

Chairman Miller: Here is the procedure. Every Commissioner will have a transcript of all the testimony before there is any ruling on this case.

Mr. McClearn: I see.

[fol. 312] Chairman Miller: So that there is no question, while the cases may be heard piecemeal by some who are not observing the demeanor of the witnesses, possibly that could be the only objection; nevertheless, there will be full opportunity to read all the testimony and all the arguments are being noted as well, and any comments of counsel. So that I think you need have no concern about the matter not being fully considered by all the members of the Commission.

Mr. Chapman: All the deliberations, Mr. McClearn, are made by the Commissioners and four Commissioners comprise a quorum. That is done in executive session with the transcript before them.

Mr. McClearn: I would like to think about it a little bit. I have nothing more to say, thank you.

Mr. Manzanares: I hate to foul it up. It is an uncle of mine.

Chairman Miller: I can understand your point of view, but I think you will find that the danger seems more real than it is, actually, because everybody is going to read this testimony. I mean, it is unfortunate that everybody can't be here throughout but these things happen.

Mr. Manzanares: Unless you would rather go right on through tonight.

Mr. Green: I concur.

Chairman Miller: I would rather not, frankly, and I [fol. 313] don't think you would want to wait until tomorrow noon to start or tomorrow afternoon. In that way we would know Mr. Manzanares would be here, if you would prefer that.

Mr. McClearn: No. It is just a new idea to me, Mr. Miller.

Chairman Miller: Well, I can see your point of view if it were simply a matter of not reviewing all of the testimony in the transcript with every member of the Commission receiving a complete transcript of all of the proceedings. As a matter of fact, under the rules, and I think under the law, the Commission has the right to designate only one as the Hearing Examiner.

Mr. McClearn: I think you are all to be commended to take the time to come down here.

Chairman Miller: Well, we appreciate your cooperation, too, in the matter, in trying to determine the issues.

All right, then, 10 o'clock tomorrow morning.

(Whereupon, at 5 o'clock p.m., the proceedings were adjourned until 10 a.m., Thursday, May 8, 1958.)

[fol. 314]

PROCEEDINGS

Chairman Miller: I think the record should show that it is now 10:20 a.m., that this matter had been continued until 10:00 o'clock this morning. The parties are here except for the Complainant and efforts to locate him have been of no avail, and if it is agreeable, we will go ahead. Is it agreeable with you, Mr. Sayers, to proceed, and Mr. McClearn?

Mr. McClearn: Yes.

Mr. Sayers: Yes.

Chairman Miller: Mr. Sayers, when we adjourned last night you didn't know whether you had any other witness.

Mr. Sayers: I think we are finished.

Chairman Miller: So that you rest?

Mr. Sayers: We rest at this time.

Chairman Miller: Mr. McClearn?

MOTIONS TO DISMISS CERTAIN ALLEGATIONS OF THE COMPLAINT AND DENIAL THEREOF

Mr. McClearn: At this time I should like to move that the allegation of Paragraph 4, which is to the effect that Respondent requested a photograph in its application

form with intent to discriminate for reasons prohibited by the Anti-Discrimination Act, be dismissed.

I should like to further move that the allegation of Paragraph 2 of the Complaint which alleges that Respondent refused to employ Complainant on July 8, 1957 because he was a Negro, be dismissed.

In both instances the motion to dismiss is based upon [fol. 315] the complete lack of proof of the essential allegations.

Mr. Chairman, I will not make an extended argument, but I would like to simply summarize the bases for the motion.

With reference to the allegation of Paragraph 2 of the Complaint, which is that respondent Complainant was not hired because he was a Negro on July 8, there is a total lack of any evidence whatsoever that Mr. Green's race had anything to do with the actions of Respondent. The only testimony on the point whatsoever is from the Complainant himself, and he testified unequivocally, truthfully, that he was interviewed, given the same treatment, so far as he could tell, as all other applicants at Continental Air Lines, that he was treated courteously, cordially and kindly, and that he personally saw no evidence of discrimination against him, and the only further testimony is from Mr. Chapman in connection with certain discussions with Mr. Bell. We objected, of course, to consideration of those discussions at the outset, but even considering them for purposes of this motion, the testimony was that Mr. Green was one of 14 applicants, four of whom were selected by Continental Air Lines. We do not question Mr. Green's qualifications as an airline pilot. Neither do we question his appearance or personality. The fact remains that without some proof that the reason he was not selected out of a much larger group is because he was a Negro, there is simply no basis upon which this charge can be sustained.

[fol. 316] The same thing is true with respect to the photograph. The photograph is only prohibited by the Act if it was included for the purpose of discriminating on the basis of color, religion, and so forth. There isn't one iota of testimony that Continental's purpose in asking for a

photograph had anything to do with the man's color or his race or his religion or any of the other prohibited areas. Consequently, that charge should not be sustained.

Chairman Miller: Those are your motions?

The Commission is of the opinion that the motions should be denied at this time subject to renewal at the conclusion of the testimony.

Mr. McClearn: All right, sir. Mr. Bell, please.

HARROLD W. BELL, JR., called as a witness on behalf of the Respondent, having been previously sworn, was examined and testified as follows:

Direct examination.

By Mr. McClearn:

Q. Will you state your name and address, please?

A. Harrold W. Bell, Jr., 5634 Montview Boulevard.

Q. What is your occupation, Mr. Bell?

A. Vice President, Personnel, Continental Air Lines.

Q. What function does your office perform in the procurement of flight crews?

A. We are responsible for eliciting applications from pilot flight engineer applicants—you are using the term in [fol. 317] elusively here, I presume—reviewing them—

Chairman Miller: Excuse me a moment, Mr. Bell. I think the record should show now that Mr. Green has appeared.

For your information, Mr. Green, Mr. Bell has just been sworn and stated his name, address and his occupation.

A. Continuing, scanning these for age, experience, other qualifications, height, weight, and retaining such applications in a file, an eligible file, for review at such time as openings might appear.

Q. Do you attempt to maintain a file of at least paper-qualified pilot applicants?

A. Correct.

Q. Does the number of persons in the Continental pilot force—and I am using that term throughout these proceedings as including both pilots and copilots—does the

number of Continental pilot personnel vary from time to time, and if so, in what manner?

A. Yes. There are pronounced variances in the numbers of pilot personnel, depending on the addition of flights perhaps in season or the cancellation or withdrawal of such flights which would produce, of course, furloughs, from the dismissal of pilots for cause who are in their probationary period, from the addition of new routes that would require more flights, and consequently more crews. So there is a fluctuation caused by normal ebb and flow of business as [fol. 318] well as the expansion of the airline.

Q. And that's both up and down?

A. Correct.

Q. Now, when the company decides to employ additional pilot personnel, what does your office do?

A. We will extract all of the eligible applicants, paper eligibility being the term used here, review them with the operations department representatives, will then be advised the number of openings and will call in pilots for check-out, for personal interview, for flight check in the manner that has been previously discussed.

Q. Do I understand that the company is constantly receiving and processing paper applications?

A. Constantly from all over the country, from all over the world.

Q. Now, if you have a certain number of positions to be filled, how many applicants will you bring in, for example, for interview, or how do you determine?

A. That's a somewhat difficult question to answer. I might depart one moment and say that in our experience we hire one of every five paper-qualified pilot applicants that appear before us and are interviewed. That isn't necessarily to say that if we have five openings we will bring in 25 applicants. We might bring in 35, depending on where they live. But as we realize that they are going to be put to some expense in coming to us, they might be [fol. 319] in Boston, or as in Mr. Green's case I believe in New York, and he was put to some expense to visit us, and so we are not frivolous in calling in great wads of people, but we want to be sure that when we call them that we will on an average be able to get the number that

we wish, knowing that perhaps 80 percent are going to be disappointed.

Q. But you do bring in, then, more paper-qualified applicants than there are positions to fill?

A. Substantially more.

Q. Is there a reason for that practice?

A. Yes. As long as we are screening applicants we might as well screen a substantial number in anticipation of future openings, so that we can avoid that re-check, we will know that we have somebody, and not just standby reserve but ready reserve that we have already checked out. The only thing perhaps we might not do with certain of these excess applicants, if we can use the word, is give them a physical examination, as that we want just before they are assigned to actual student training.

Q. Now, what happens to a pilot applicant when he is brought to Denver for interview?

A. Many things. Sometimes we believe we could handle it much better. Our employment operation is conducted approximately three and a half miles away from the airport. The pilot applicant has been sent passes or we have requested passes perhaps from other airlines to bring him to Denver at no charge to him except perhaps a service [fol. 320] charge that such an airline might levy. He will come into the terminal at some time, as he is on what we call a space available basis. We are never sure exactly what flight he might be able to come to Denver on.

But he will usually call us and we will instruct him perhaps to come to our employment office; sometimes he will go immediately to the hangar, to the operations department, and we have no objection to this at all as long as that at sometime we have an opportunity just to say How Do You Do to him.

Q. Do I understand that some portion of Continental's offices are located at Stapleton Air Field?

A. That is correct, the operating departments primarily.

Q. And what offices are located elsewhere?

A. The Treasury Department and the Personnel Department.

Q. I see. Now, what happens to the pilot after he arrives in Denver for this interview?

A. Well, if he has gone directly to the operations department he will see the Chief Pilot, the person responsible for handling the Denver Pilot Base. He is expected, of course, so that he will be given a link check and a flight check and there will be some discussion with the pilot to determine what he has been doing, what type of flying he has. We will frequently not wish to employ a man, regardless of his experience, if a substantial part of it has been command time. Maybe I should explain what I mean here. [fol. 321] Q. Would you, please?

A. We hear a great deal today of the career copilot, the individual who will not be able to bid up to Captain for eight, nine, ten years or longer who will forever be in a secondary position, it seems like forever to him. We have found it unwise to take them with too much experience because of their unwillingness to take orders from the captain. We recently rejected a man with 7,000 hours' flying time.

Q. Who was otherwise qualified?

A. Otherwise qualified. It is more than just flying qualifications, of course, that we are concerned with here. But he will be checked out or he will be returned to his home city or whatever point he came from and will be later advised whether or not he is accepted and included in the class.

Q. That is one among several qualifications which the Company looks for in its applicants, is that correct?

A. Correct.

Q. What are some of the other qualifications which Continental pilots must have?

A. Certainly flying aptitude as well as flying experience.

Q. Where would the aptitude be demonstrated?

A. It will be demonstrated in a link. It will be demonstrated in actual flight check in the air.

Q. Given by Continental?

A. Given by a qualified Continental check pilot.

[fol. 322] Q. Are there any other factors or qualifications?

A. We are very interested in his attitude, what is he looking for, is he perhaps—has he been— Well, I wonder if I could depart a moment here just to generalize on some-

thing. I don't want any airline identified by what I say but I think perhaps this will explain, if I may.

Chairman Miller: Yes, I think the more facts the better.

A. Airlines are grouped in various classes. You have your four largest airlines, any one of which is five to six times as large as many of the smaller ones. Many times a large airline will have hired a pilot, and will furlough him. They may train for stock, so to speak, and have him available. He will come to us for a position. We have often found that the pilot conditioned by a major carrier looks down his nose slightly at a small size airline like Continental. So we want to know what his attitude is. Does he feel perhaps another line has mistreated him? Does he feel that he is the best pilot in the world? Is he going to be able to learn? What is his home life, what is his domestic life, what is his financial life? In the public eye, the pilot is quite a glorified person. We put our lives in his hands. I am not a pilot, so I can speak very freely here. We put our lives in his hands—

Chairman Miller: I agree with you.

A. Everyone of us. The Hell's Angel type of pilot is a thing of the distant past. We want a person who has [fol. 323] been a good normal, quiet, self-respecting individual who is going to take good care of his passengers by taking good care of himself and his personal life. So these things we are trying, admittedly they are subjective and they always are when you are talking to someone, but these we try to identify at the time we are interviewing pilots.

Q. Now, you stated that approximately one of five persons who is brought to Denver for the flight check type interview is selected and you have indicated some of the qualifications that you are looking for. What bases do you use for not hiring, let's say, the other four?

A. Well, they can run all over the lot, Mr. McClearn. I will give you a rough example. We rejected 143 pilots last year as being unsuitable. In some cases there was falsification of their applications, distortion of their actual flying experience, perhaps they failed to meet certain physi-

cal requirements such as height; they were overweight; perhaps they were unable to fly if they said they could, and we were so able to demonstrate. Perhaps we weren't impressed with their manner when they talked to us, and pictured them before a Continental passenger or crew of passengers and felt perhaps that they would be happier working for another organization.

There are many reasons for the rejection of a pilot. We have been in a very fortunate position, I am knocking on wood here, on this. Because of our small size and our excellent location we have been able to draw pilots from almost anywhere. Our bases are limited, as is generally known. We are expanding, and consequently a pilot is able to perhaps be advanced more rapidly with us than he would with another airline. And so we have been able to pick and choose and often we have made mistakes, I am sure, but they are honest mistakes, anyway.

Q. You have stressed the attitude of the pilot applicant. Does his attitude with relation to his fellow pilots and his fellow pilot's relations with him come into play in that area?

A. Vital.

Q. For what reason, Mr. Bell?

A. 99 percent of a pilot's flying time is perfectly uneventful but in a moment of emergency there has to be implicit confidence one man in the other that each will know his business and be able to perform his function rapidly and without question.

Q. Are you in effect saying that the pilot and copilot must operate in harmony as a team?

A. Exactly.

Q. Now, turning to 1957, will you state whether or not Continental Air Lines employed additional pilots during that year?

A. Yes. We employed approximately 35 pilots.

Q. Excuse me, there's one point I wanted to bring out in connection with our immediately past discussion. You [fol. 325] stated that Continental employs, approximately one out of five persons that it brings to Denver for interview. Now, do you receive other applications whom you do not even bring to Denver for interview?

A. Yes.

Q. Any substantial number?

A. I don't see all the applications. Mr. Sorby, the Employment Manager who is in this room, is better informed on this than I, but I imagine that we receive three for every one that we believe should be brought in to see us.

Q. I see.

A. That's a guess, the actual percentage of rejection.

Q. Again to 1957, can you state during what periods of the year you employed these 35 people?

A. Yes. If you don't mind, I jotted down earlier the approximate months in which we had classes. There were 8 pilots employed in January of 1957, there were 4 in March, there were 4 offered positions in July, we only trained 3; there were 10 in August; there were 7 in September; there were 3 in November.

Q. Now, you used the word "trained" and "classes". Will you tell the Commission what happens to a Continental pilot after he has been selected for employment and before he is put on schedule?

A. Well, he is put through approximately one month of [fol 326] intensive training classroom and in the air on the types of equipment that we fly, the engine, the operation of the engine, things that might go wrong. He is constantly tested to make sure he is keeping abreast of the information being provided him. He is given training, of course, on our own procedures, our cockpit procedures, airway procedures, governmental regulations, and, as I say, interwoven constantly with flight time in the air.

Q. Now, in connection with the persons whom you employed can you state how many persons were interviewed as opposed to those who were actually employed during the year of 1957?

A. About 178 people were actually screened by us to select these 35.

Q. 178, approximately, brought to Denver for interview, is that correct?

A. Yes. There's my one for five relationship.

Q. And in connection with the July class from which you stated you took four people for training, how many people were interviewed at that time?

A. Fourteen.

Q. When was Mr. Green interviewed, approximately?

A. June 26 and 27.

Q. And then the next successive class would have been the July class, is that correct?

A. Yes.

[fol. 327] Q. And you heard Mr. Green testify yesterday, did you not, that as far as he could tell he was given the same treatment at Continental as other applicants at the same time?

A. Certainly.

Q. Was that accurate?

A. Yes, to the best of my knowledge. I didn't have the pleasure of meeting Mr. Green until yesterday morning.

Q. Now, Mr. Green was not of the 14 persons interviewed just prior to the July class, Mr. Green was not one of the four selected, is that true?

A. That is correct.

Q. All right. What was done with Mr. Green's application at that time?

A. It was kept in a file of eligible checked-out pilots from whom we could draw for subsequent classes.

Q. Mr. Green, then, did meet Continental's minimum qualifications for pilots, is that correct?

A. He did.

Q. And what was Mr. Green's status after he was advised that he had not been selected for the July class?

A. Still retained as an eligible candidate for pilot position.

Q. Now, that wasn't true with respect to all of the people who had previously been interviewed, is that correct?

A. No.

[fol. 328] Q. What was the position of some of them?

A. They were told one way or the other that they were not going to be considered any further.

Q. In other words, those persons that didn't meet the minimum qualifications were not subject to further consideration?

A. That is correct.

Q. Now, after that time was Mr. Green's application withdrawn from further consideration?

A. It was in the early part of August.

Q. For what reason?

A. We were made aware of some publicity appearing in the Albuquerque Journal of August 4, advising that Mr. Green was bringing an action against various persons and companies, which seemed to be quite extensive, and at that time we elected to cease considering him.

Q. For what reason? Well, let me phrase it differently. Would you explain to the Commission why in your judgment Mr. Green's action in bringing actions against other persons should or did cause his application to be withdrawn?

A. Well, for a number of reasons. One, the feeling that we have that a pilot because of his unique position should not be involved in public controversy. Now, this is Continental's feeling, strong as it is. It is my own personal feeling, also, that during Mr. Green's training period there [fol. 329] was strong likelihood that he would be required to appear elsewhere perhaps in pleading of the various cases, and we believe that a person should stay in training until the thing is completed. You can't break it off in the middle and have it pop up elsewhere. Those were considerations that influenced us.

Q. Was the fact that Mr. Green's other actions had to do with his race significant, or did your objection go to any type of activity?

A. Any type of activity. We are not interested in those, as the saying is, pilots who make the front page.

Q. Regardless of for what reason?

A. Regardless of what reason. In our experience we have terminated pilots for just this reason, who are out of their seniority period, out of the probationary period.

(Respondent's Exhibit No. 2 was marked for identification.)

Q. Mr. Bell, I hand you what has been marked Respondent's Exhibit 2. Will you tell me what it is, please?

A. This is an application for employment currently in use by Continental Air Lines.

Q. How long has that form been in use?

A. Since January 1954.

Mr. McClearn: Mr. Sayers, I hand you Respondent's Exhibit 2.

I offer in evidence Respondent's Exhibit 2.

[fol. 330] Chairman Miller: Any objection?

Mr. Sayers: No objection.

Chairman Miller: Respondent's Exhibit No. 2 will be admitted.

(Respondent's Exhibit No. 2 was received in evidence.)

By Mr. McClearn:

Q. Did the former form which was superseded by Respondent's Exhibit 2 have a space for the applicant to indicate his race?

A. Yes.

Q. Does that space appear on the form presently in use?

A. It does not.

Q. Will you tell the Commission why that was eliminated?

A. Useless information. We are not interested in the racial extraction of an applicant and we needed the space also for useful information. We organized the form completely and deleted those things in which the Company was not concerned.

Q. You heard Mr. Green testify yesterday that he obtained the form which he submitted, which was the old style form at your San Francisco office?

A. Yes.

Q. Can you explain how Mr. Green happened to obtain that form, the old style form?

A. Well, I can't explain how he happened to obtain it. I can explain how it happened to be there, I am sure. We [fol. 331] have had trouble with that form from time to time. It looks almost identical to this application, with the same heading. When the form was revised—we completed our revision in 1953 and it was issued January 1, 1954—we instructed all field offices to destroy the obsolete form, not once, but on a number of occasions. The active points on our system that we visit every now and again will use up their applications rather quickly. San Francisco is not yet a Continental point. We hope that we will be serving it before the year is out. We maintained a sales office in

San Francisco which was, as the term goes, off-line. Apparently there had been very little request for applications, as it is the only explanation I have of Mr. Green being able to find one. We are continually in an expense control drive and I suppose somebody thought, "Well, now, that's a fine application, I'm not going to throw it out and we'll just wait until we use it up."

Q. But your office has instructed the various offices where this form is distributed not to use the old form?

A. Correct.

Q. Now, in connection with their application form does Continental request applicants to submit a personal photograph?

A. We do. We ask for it from some classifications, those that primarily are facing the public, whose physical appearance and attractiveness is a selling point, and pilots to a certain extent, and hostesses to a very great extent. [fol. 332] Q. How long has Continental asked for photographs in connection with applications?

A. Well, to my knowledge, through the 1940's and 1950's.

Q. Can you state whether the practice of requiring a photograph with application forms is widespread both among other air carriers and businesses?

A. It is my belief that it is widespread among air carriers. Other businesses I am not too familiar with, although we have seen quite a number of application forms from other companies. The air lines, I am sure, have the same concern that we do.

Q. Well, now, in connection with the reason why you ask for a photograph, can you amplify or can you tell the Commission why you can't observe the person's characteristics when they are brought to Denver for interview?

A. Well, the person brought to Denver for interview may have come from any part of the United States, in some cases from Canada or Mexico, at some expense to them. If we can see at the outset a physical disfigurement or lack of an attractive appearance which would perhaps disqualify, let's say a hostess applicant, where the hostess must be attractive, she is used for sales promotion purposes and for every reason that we are all familiar with here, to require such a girl to come from Boston or somewhere else

at an expense that can be substantial and be disqualified we feel is wrong.

[fol. 333] For example, we frequently have people who falsify their applications, girls particularly, and I am not, the ladies present, discriminating against ladies, but whose pictures perhaps won't reveal the fact that they do have a problem that does show up when you face them, a scar, a disfigurement, that would cause their disqualification. Quite frequently the application will show you what you need to know. It is the hostess group that we are primarily concerned with here, the pilot group to a certain extent. Thereafter, in diminishing importance, the photograph. I doubt that we ever require a photograph from office personnel, reservations personnel, and I am certain that we call in for interview many people who have not submitted a photograph.

Q. Does the company expend a certain amount of time interviewing persons, is that a factor?

A. A constant factor, yes.

Q. In other words, there is no point in expending your time and the applicant's time interviewing them if a disqualifying disfiguration is apparent?

A. Not only is there no point in expending the time, but I personally feel that it is unfair to the individual who is turned down to face that embarrassment. We try to make it as gentle as possible.

Q. Now, will you tell the Commission, Mr. Bell, whether Continental's request for a photograph contained in the [fol. 334] application has anything whatsoever to do with discrimination based on race or religion?

A. Nothing at all.

Q. Will you tell the Commission what Continental's policy is with respect to employment of the so-called minority groups, if it has such a policy?

A. Actually, we have no policy at all. Perhaps that's the most positive method of expressing it. It was read yesterday into the record and it is a policy to which we adhere.

Q. Can you paraphrase that again, please.

A. We do not discriminate in any way for race, religion, or for any other reason. We are trying to judge applicants

on their qualifications, what they can offer us, what kind of citizens are they going to be with Continental Air Lines, how good are they in representing our company. Every employee is a representative of our small airline and I am sure of the larger ones, too. It is those things we are looking for.

Mr. McClearn: Would you mark that Respondent's Exhibit 3, please?

(Respondent's Exhibit No. 3 was marked for identification.)

Q. Mr. Bell, I hand you what has been marked Respondent's Exhibit 3. Will you tell me what it is, if you know, please?

A. That is a Telefax communication from Western Union.

Q. Was that received by Continental Air Lines?

[fol. 335] A. Received by Continental on a machine in our office.

Q. Does it have to do with Mr. Green?

A. The name Marlon D. Green is mentioned.

Mr. McClearn: I offer in evidence Respondent's Exhibit 3.

Chairman Miller: No objection. It will be admitted.

(Respondent's Exhibit No. 3 was received in evidence.)

Q. Would you read the contents of the exhibit, Mr. Bell?

A. "Your night letter 5th (July) Marlon D. Green, 734 South Smith Avenue, El Dorado, Arkansas, signed Jack Weiler, Continental Air Lines, Inc., undelivered. Said to have gone to Lansing, Michigan, 9113 Nypt Street, Service Department, Denver 6th."

Q. Does that exhibit bear a stamp indicating when it was received by Continental?

A. Received by Continental Air Lines on July 9, 1957, in the Personnel Department.

Q. Will you tell the Commission generally what the nature of Continental's business is?

A. We are an airline certificated by the Civil Aeronautics Board to provide air transportation to passengers, freight, cargo and mail.

Q. In what States does it operate?

A. We operate in eight States, Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois, and California.

[fol. 336] Q. Approximately how many employees does it have in Denver?

A. Approximately 800 employees.

Q. How many pilots, Mr. Bell?

A. Approximately 220 pilots.

Q. Where are those pilots based?

A. 90 to 95 are based in Denver, and I am pulling this out of memory; we have bases at El Paso and Dallas, and I would say of the 125 remaining, about 60 in each, 60 to 65 in each city. Dallas and El Paso, did I add that other city?

Q. Yesterday Mr. Chapman and Mr. Binkley testified concerning a conversation which you had with them in your office, I believe, on or about September 10, 1957. Will you tell the Commission first what subjects were discussed at that time?

A. Well, initially the complaint of Mr. Green that Continental had refused to hire him because of his color, the facts of the case as we knew them were reviewed. There was a general discussion—

Q. Excuse me. Were those facts substantially the facts to which you have testified this morning?

A. Correct.

Q. Proceed.

A. The Company's feeling about people in public controversies was explored and then Mr. Green was not discussed for the balance of our conference which had been [fol. 337] conducted on a very informal basis, a very pleasant basis. Mr. Chapman was very interested in how the colored pilot was going to obtain job opportunities in the airline industry.

Q. Are you speaking of colored pilots specifically or generally?

A. Generally.

Q. You weren't talking about Mr. Green at that point?

A. We had, to my knowledge, concluded the discussion of Mr. Green and Mr. Chapman said something to the effect, "How is this problem in the industry going to be broken?"

Q. Yesterday Mr. Chapman and Mr. Binkley specified certain things which you purportedly said at that meeting. Would you explain the context or explain if you said those things, and if so, the context in which they were made.

A. Well, during our conversation, which was informal, and I want to stress here that any of those things were a personal opinion brought out solely during the course of the conversation with Mr. Chapman asking, I suppose, for my professional opinion as to what might be done throughout the industry, and I did express certain problems that I think we are all aware of as considerations.

I recall stating first off that it would be very difficult for Southern airlines, regardless of how they felt, to be the first to move; that, as I believe Mr. Chapman or Mr. Binkley brought out, it was my feeling that perhaps a Northern [fol. 338] carrier would be the first to prove to the industry that there was no problem and that there would be no cockpit conflict of any sort, and again as a personal speculation when we were reviewing possible problems I mentioned one of layover points. A layover point, I think as most of us know, forgive me if I use a term that has industry identification, of housing, the possibility of restaurant facilities in some areas that might be made an issue of by certain people. These were personal concerns entirely.

There was mention of my feeling about the Airline Pilots' Association and I have no knowledge whatever, I think this was brought out, of what their attitude as a Union is. They are a very fair organization and I do have high regard for them and I think they will be perfectly fair in this matter.

Q. As I understand your testimony, then, Mr. Bell, this discussion of possible industry-wide problems took place after you had discussed with Mr. Bell and Mr. Chapman and Mr. Binkley Continental's application from and treatment of Mr. Green?

A. General conversation, that was all.

Q. Did you feel that Mr. Chapman was inquiring for the purpose of obtaining information about an industry-wide problem?

A. Exactly. That was the only feeling I did have, that he wanted my opinion as an industry representative with some experience, not speaking for the industry, of course, [fol. 339] or for our own airline, but just what did I think might be done, and that was my entire feeling during the conference relating to this subject, that it was to give Mr. Chapman some avenues of approach, perhaps, and his assistants.

Mr. McClearn: That's all I have at this time, Mr. Miller.

Chairman Miller: Mr. Sayers.

Mr. Sayers: May we have a short recess?

Chairman Miller: Five minutes?

Mr. Sayers: Five minutes will be sufficient.

Chairman Miller: All right.

(Recess taken.)

Chairman Miller: Are we ready to proceed?

Mr. Sayers: We are ready.

Chairman Miller: All right, Mr. Sayers.

Cross examination.

By Mr. Sayers:

Q. Mr. Bell, will you restate to me so that I can know just what your job is at Continental?

A. Well, sometimes it is not an easy question to answer, sir, but I am Vice President of Personnel. I am responsible for, well, general area wage and salary administration, recruiting, assisting in the selection of eligible candidates for positions, the maintenance of files of eligible people, collective bargaining to a limited extent, general indoctrination.

Q. Do you interview the applicants as they come in?

[fol. 340] A. Only occasionally, Mr. Sayers. We have an employment operation; Mr. Sorby is the Employment Manager who is responsible primarily for the actual interview.

Q. And did you have any part at all in interviewing Mr. Green?

A. No. As I say, I didn't meet Mr. Green until yesterday morning.

Q. In determining the qualifications, now, Mr. Bell, for your fliers, you have gone into detail somewhat about what is required. First, I believe you mentioned the flying aptitudes. Explain or break down a bit just what that would entail.

A. Well, aptitude, of course, would be the ability to fly or to learn to fly. In our case we want it brought one step farther to actual flying proficiency, not too extensive, and as we don't have the facilities for a great deal of training we don't want it too limited.

Q. You also consider experience, I believe?

A. Yes, we do.

Q. That is, the pilot's prior experience before he makes application, is that correct?

A. Exactly.

Q. And the pilot's attitude, now, will you break that down a little more as to what you require in attitude?

A. Well, that is objective and I wouldn't exactly know [fol. 341] just how to define attitude. It is your reaction to the man as you talk to him, what you can extract from his work record, what you can see from his home situation; as our application shows, there is provision for marital status to be included. We are interested in scholastic history, scholastic activities, what did the person do. If we were, for example, hiring a salesman we would want someone who had been active in meeting and working with the public, and so on, how did he conduct himself during the interview?

I mentioned a problem that I am sure Continental isn't alone in, in sometimes running into people who look at us as a very small-time operation, which we find sometimes offensive. It is total reaction to an individual based on what he can show and tell you.

Q. How are those things gathered, or by whom are they gathered, these different—well, for instance, the aptitude test, experience test, and attitude test, who checks on that?

A. Well, those who have actually interviewed the person, talked to him.

Q. And they make a written record of it I suppose?

A. Not always. We aren't that formal, nor do we have the clerical assistants to put everything in writing. It can sometimes be conversation.

Q. Well, do you have anything to which you could refer to to show how Mr. Green responded to these various tests that [fol. 342] we have mentioned?

A. I imagine Mr. Green, as we have already said, Mr. Sayers, is a good pilot and a very pleasant chap. He conducted himself very well with us.

Q. You spoke of the larger airlines. You testified that you were giving your personal opinions as to some expressed fears, perhaps we should call them, and I am wondering if you can tell the Commission at this point whether or not any of the larger airlines are now hiring Negro pilots, do you know?

A. I do not know.

Q. Do you know of any effort that has recently been made by these larger airlines to get Negro pilots into their service?

A. No, sir, I do not. I don't know of any effort.

Q. Do you know of any conferences that have been held in that regard?

A. None that I have attended or know of personally. I believe there's a President's Committee on Fair Employment Practices that meets every now and again with some of the airlines. I am not aware—

Q. You are not a part of that?

A. No, we are not a part of it.

Q. Well, are you informed as to what is being done, if anything, by the larger airlines towards working the minority groups into their service?

A. No. We do not exchange employment information of [fol. 343] that sort. May I say here, Mr. Sayers, we don't exchange it, there is no formal exchange. Every once in a while we may run into someone who is recruiting for another carrier and ask how he is making out, what are you looking for. Sometimes another carrier will call up and say, "We need people for our accounting department", and we will try to refer them to them, but being in Denver and somewhat isolated there is no heavy recruiting of ground personnel here. We don't know too much of what the other people are doing.

Q. Now, at the time Mr. Green was asked to come to Denver, I wonder if Continental knew that he was a Negro?

A. No, I don't believe so.

Q. When did you first find it out, when he arrived?

A. Presumably.

Q. Would it have made any difference, do you think, with Continental if they had known that Mr. Green was a Negro?

A. We were interested in checking Mr. Green for his qualifications as a pilot, to make sure that he was an acceptable pilot.

Q. And his qualifications proved satisfactory throughout?

A. They were satisfactory.

Q. At the time Mr. Green was here, by whom was he interviewed?

A. It is my understanding, and I believe Mr. Green [fol. 344] brought this out yesterday, that he talked to Mr. Cramp and Mr. Sorby of the Personnel Department.

Q. And do you know or do you have any information as to what transpired in those interviews?

A. No. I think we have already stipulated that he met our qualifications. There was none—occasionally, of course, those who do interview will get together and say "We don't think this would be a good man for a given job" or a good woman for a given job and if there is unanimity of agreement, that is the end of the applicant. Nothing of that sort intervened in Mr. Green's case.

Q. I believe you testified that after Mr. Green had returned or had had his interview and had perhaps returned to New York or back East, you left his file among the available list?

A. Yes.

Q. And it so remained for how long?

A. Until this Associated Press article appeared in the Albuquerque Journal, it was brought to our attention.

Q. Do you now recall what this article consisted of?

A. Yes.

Q. Would you tell the Commission about this article?

A. Yes. There was an article over an A.P. identification, there was no date appearing, it was not date-lined, stating that Mr. Green had brought action against several airlines. [fol. 345] Now, this is out of memory, United I believe was one, Capitol was another, I don't remember the other car-

riers, against General Motors and against a fixed-base operator in Lansing, Michigan. It is my recollection there were three or four airlines included. We have, of course, the article, but I don't have it in my pocket.

Q. And was there something about this article that caused your office to become antagonistic to Mr. Green?

A. We felt, as I have stated earlier, that pilots leading the kind of lives they must in the public eye, should not be in public controversy. We might be thoroughly sympathetic but we still feel a pilot is in a very unique position before the public.

Q. I believe you also mentioned, and referring now to your personal opinions, perhaps not speaking for Continental necessarily—

A. No.

Q. —but you felt, I believe you testified, that you were a little afraid there might be lack of cockpit harmony?

A. That is always possible.

Q. Could this lack of harmony result between two persons of the same racial identification?

A. It certainly could.

Q. Does it ever happen, so far as you know?

A. I believe it does, and I believe we have had to take [fol. 346] action when it occurred.

Q. Would you know of any instances of any breaks or crashes having occurred as a result of this lack of harmony in the cockpit?

A. None that are so identified, Mr. Sayers. May I say here that could be misconstrued. I am aware of no accidents that are even indirectly attributable to that matter, lack of cockpit harmony.

Q. Well, I might ask you this: Do you know of any instances wherein a crash has occurred as a result of a lack of cockpit harmony because of a White pilot and a Negro copilot, do you know of any such?

A. No.

Mr. McClearn: Mr. Chairman, I wonder if inquiry into Mr. Bell's personal opinions is germane to the issue before the Commission. We, of course, went into them on our direct

examination to explain the context in which they occurred in reference to Mr. Chapman's testimony only.

Mr. Sayers: We feel that these people's attitudes toward cockpit harmony and other attitudes are very important toward the hiring of Mr. Green. If they feel that a White man and Negro cannot operate in the cockpit harmoniously I think the Commission should know how they feel about that. I feel there is nothing to hide about that. If Mr. Bell has a personal opinion and is in a hiring position, that [fol. 347] personal opinion would certainly affect his hiring.

Chairman Miller: I think he might inquire.

A. But may I clarify that further? I did not say this was my personal opinion, nor did I say any of this was my personal opinion. I said it was a matter for consideration and concern. How I personally feel is that there should be no discrimination. I have said that, but I am not certain that everyone agrees with me who is identified with the airline industry. I would like to make that very clear. This is not a personal opinion of mine, Mr. Sayers.

Q. It is not an opinion of Continental?

A. It is not an opinion of Continental Air Lines.

Q. Just merely discussing what might be, the fears that arise?

A. Things that could happen.

Q. Things that could happen?

A. Problems that could face the people of good will who are trying to solve this problem in their efforts to solve this problem. That was the area of our discussion.

Q. Let us return a moment now to the publication. I wish we had that, but nevertheless, if this publication or a similar publication had been made, we will say, by a so-called White person, if it could have been so made, would Continental's attitude have been the same?

A. Exactly. Exactly.

[fol. 348] Q. Mr. Bell, could it be possible that Continental has two types of application blanks, one to be given to minority groups and one to White groups?

Mr. McLearn: I object to that question as scandalous in view of the sworn testimony which has been presented here this morning, scandalous and scurrilous, Mr. Sayers.

Mr. Sayers: It is not scandalous or scurrilous. The San Francisco office has given Mr. Green an application which calls for a photograph and calls for race. The application which was as late as 1957, they tell the Commission today that they haven't used that type of application since 1954. The application they present to the Commission does not have those features on it. Why should Mr. Green as late as 1957 get such an application?

Mr. McClearn: I say that the testimony was not to that effect, Mr. Chairman. The testimony was that certain of the old application forms still keep cropping up and Continental has done everything it reasonably can do to eliminate them.

Chairman Miller: Do we have the original application here?

Mr. Binkley: No.

Chairman Miller: We do not have that. It is not in evidence. I think the question was, could it be possible there are two separate applications?

Mr. White: I wonder if we could see the original?

[fol. 349] Mr. McClearn: I would be glad to make it available to the Commission.

Chairman Miller: All right.

(Original application produced.)

Mr. McClearn: May I say, Mr. Chairman, that I strongly resent the inference to be drawn from the last question, but I have no reluctance in having our witness answer it.

Chairman Miller: I understand.

The Witness: Mr. Miller, you can see where the effort to simplify and reorganize the material is intended to produce a more efficient form, more useful. Much of it we have deleted. We have given more room to work record, for example, and made other changes that we thought improved the form, and would like to say once again, Mr. Sayers, we do not have a dual form. We have only one application for employment. We have a supplementary sheet that is attached which is used for mechanics, pilots, hostesses, because it has information we are not interested in from other people, but that's all.

Chairman Miller: You may proceed.

By Mr. Sayers:

Q. Mr. Bell, again I have to ask you perhaps for a personal opinion because of your position with Continental. As their representative would you be willing to see a man or person, such as a Negro, employed by Continental as one of its copilots?

[fol. 350] A. If he was a qualified man, why not?

Q. And when you say qualified, just what does that cover?

A. Able to fly, fly well, fly safely, and be a good member of the employee group.

Q. Now, as I understand you, Mr. Green's application has been withdrawn from the eligible file?

A. That is correct.

Q. Because, primarily, of the newspaper article appearing under the Associated Press name?

A. Yes.

[fol. 351] By Mr. White:

Q. I would like to ask, Mr. Bell, even though his name was on the list, that in no way gave him ranking order on that list?

A. No. We don't have a rank order. Perhaps sometimes with applicants we are a little unfair, but I am afraid it is a first come first served basis, or maybe first come last served, in our case. We have an opening. We will pull out available applications. We don't number them or hold them in any sequence.

Q. In other words, even though you had a pilot list of, say, 10 and you were going to hire 10 people, it could be possible that one of those 10 would not be hired, that you would send out for additional pilots to come in and be interviewed, is that correct?

A. That's correct.

Q. In other words, it is possible that Mr. Green, although he was on the list, could continuously be bypassed?

A. It isn't easy, if you are in a heavy hiring drive, to overlook anyone who is eligible, but it is perfectly possible that the applications, if you need three people for a given classification, let's say stenographer, you take the first

three, bring them in, check them out. As I say, it may do some injustice to the applicants, but it is still the way we work.

Mr. White: Do you have any more?

Mr. Sayers: Yes, I do want to ask some more questions.

[fol. 352]

By Mr. Sayers:

Q. Mr. Bell, do you have anything to which you might refer that would indicate Mr. Green's standing as compared with the other applicants with regard to flying hours, aptitudes, and so forth and so on?

A. We don't give a quantitative rating, Mr. Sayers, to a pilot applicant. We don't say one man is better than another by reason of having more hours or something of that sort. We don't have more than a general "O.K." or "Not O.K." type of rating for the checked-out pilot. There is so much more that has to be done with him. You see, you only have them in the air for 45 minutes, sometimes less, and in that time, I think I am correct though I am not a pilot, conditions today would be a little different than perhaps yesterday if the sun was shining.

Q. After the flight test and the link trainer test, then what is required of the applicant, what do you screen, what do you try to determine?

A. Well, we will sometimes clear his references, depending on how far ahead we are considering people, we will perhaps have him return to his home city and he will be asked to come back again for a physical examination, maybe for another check, maybe we'll have his references cleared. Maybe we will wait until after he is hired. It is a little informal, but once we have completed the flight check self-
[fol. 353] com is a person kept on any longer.

Q. Now, in July when Mr. Green was given his tests, how many others were given tests at the same time?

A. Mr. Green, I believe, was checked in June.

Q. June.

A. I believe, and I think I had him one day off. I believe it was the 25th and 26th, not the 26th and 27th, but he and fourteen other people were checked over perhaps a weekly span.

Q. And out of the fourteen tested, as I understand, you selected only how many?

A. We selected only 4.

Q. Only 4?

A. At that time.

Q. 4 for the training class, is that what you call it?

A. Yes.

Q. Training class. Have you anything to which you can refer, or do you remember how Mr. Green compared with the 4 that were selected?

A. No, he was acceptable just as the ratings of all check pilots are.

Q. And on what did you base your selection of the 4, if Mr. Green compared with the others favorably, on what did you base your selection of the 4 and omit the fifth?

A. Well, as we have already stated, Mr. Green was qualified to fly. We checked him, his record looked good. It would be that sort of basis for selection.

Q. And we can assume that the record of the other 4 also looked good?

A. Correct.

Q. And yet the 4 that were selected I am presuming were all White, is that correct, so-called White?

A. Yes, I presume.

Q. And yet Mr. Green who had an equal record for some reason was omitted in the selection for the training class. Now, can you tell my why was this 4 instead of this 4 selected?

A. It could be happenstance. I think it might be well to bring out, as Mr. Green mentioned, another pilot applicant named Burke, who was not included in that four, who is an able pilot, also. Though we had an August class we did not include Mr. Burke in the August class. He was included in the September class.

Q. All right. What I am trying to get you to tell me now is what did the four selected—what did they have that Mr. Green didn't have?

A. That is difficult to say. Perhaps there were four or five or six that were acceptable and the first four were used. As I have said, we sometimes train or check out for stock and we keep them in an eligibility file.

Q. Were these four that were trained or that were selected for the training class, were they hired subsequently?

A. One refused to come with us for personal reasons and only three were trained, and I don't know whether they are all flying now or not. All were furloughed in January, in any event. Some have been recalled but not very many.

Q. Now, were they furloughed because of some fault in their work or something like that?

A. Business conditions in the airline industry brought on some rather strenuous moves very quickly.

By Mr. White:

Q. Who makes the final decision on who is to be hired and who isn't?

A. It works about like this. If a pilot applicant appears to be successful, there may be 5, 6, 7 applicants, and the Operations Department, we are just talking about that particular department, needs four, they may take the first four, just say "Get these people in, hold the others until we need them." A decision for final employment is usually the department head's. We do not make the final decision here. But I am not passing the buck in any sense of the word here. It is just they need four, they found six acceptable, four will be used.

Q. Did you sit in on the determination of what four would be hired?

A. No.

Q. Did you know that Green was a Negro and was one [fol. 356] of the fourteen applicants in the June test?

A. No, I don't think I heard about it until sometime in July. Mr. Green, I believe called me sometime in July and we talked on the phone, July 8; I believe. I had heard that a Negro candidate had been screened, I wasn't sure of the date, and that he was a good pilot.

Q. Did Continental know prior to Mr. Green's appearance that he had filed cases in other States alleging discrimination?

A. No, sir. You mean his appearance in June, June 25 or 26? No.

Q. The only information you had was this Albuquerque News clipping?

A. Correct. We verified the facts in the clipping before making a decision.

By Mr. Sayers:

Q. About what date did this clipping appear, do you remember?

A. Yes, Mr. Sayers, it was the August 4 issue of the Albuquerque Journal.

Q. And that would have nothing to do with your not selecting Mr. Green for this first class that was to come up in July?

A. We didn't need as many as we checked out. That was the size of it.

By Mr. White:

[fol. 357] Q. Does your check pilot make recommendations other than the flying ability of the candidate?

A. No, he doesn't, although if he finds the individual surly in the cockpit even though he might be able to fly, or unable to follow instructions quickly, he will make such an observation.

Q. So his job is primarily the check-out of the man's ability as a flier?

A. Does he have it or doesn't he?

Q. Then further interviews must be made in regard to, say, a man's character or personality and so on?

A. Yes.

Q. In Green's case, who made those determinations?

A. In Green's case he had his military record with him, which certainly is as excellent a character reference as you can find. There was no heavy screening of Mr. Green's application following his successful check-out.

Q. Well, the four applicants that were selected, did any of those have further interviews than Green?

A. Not to my knowledge.

Q. In other words, they had just been checked out by the chief pilot, and could have had then a casual interview by Mr. Sorby?

A. Yes.

Q. In other words—

[fol. 358] A. Told to go home, then subsequently received a wire saying, "Report for class on such-and-such a date, arrive a day early for physical examination."

Q. We have a problem here of five qualified pilots. You picked out four and one wasn't chosen. Now certainly I would like to follow that vein of thinking. What did these four have that was superior to Green, or we could put it another way, did Green have something that the other four didn't have that disqualified him?

A. Not necessarily, Mr. White. I think I should make this clear. We have used these numbers, these classes, and the number is considered as almost separate compartments. Once we, and I am sure any other airline, start a hiring drive or is hiring aggressively for any classification, the grapevine carries it all over the country and you have a steady flood or roll of applicants, you screen them more or less constantly, and my cutoff points have been those that have been considered up to the time that a class was formed, but the screening process is almost continuous unless you are just flatly not hiring and a pilot appears and says, "I want to be checked out" we won't take the time nor money to do so.

Q. Have you got a record to show that the other four applicants were screened and flight checked ahead of Mr. Green?

A. Not necessarily. It was all more or less the same. I mentioned one, Mr. Burke, whom Mr. Green met, who was [fol. 359] checked, I think, on the same day.

Mr. McClearn: Excuse me. I think the record will show the name was Bryant.

The Witness: Bryant, excuse me.

Q. Specifically, why wasn't Mr. Green hired?

A. We didn't need that number of pilots.

Q. I mean why wasn't he one of the four?

A. Well, why wasn't Mr. Bryant, for that matter? I don't mean to quibble, Mr. White, I know how we work. A pile of eligible people, they could be hostesses or anything, we take the first four.

Q. I am looking at the percentage. We have one Negro that wasn't hired, the rest of them were whites. Looking at it percentage-wise, naturally you could assume there would be more Whites than colored people at that particular time hired. But here I understand you have had only one Negro applicant so far and he was not hired, which gives you a 100 percent bad batting record, you might say. That is what I want to know, why specifically Green wasn't hired. We are not employment agents, you understand that.

A. I know that, Mr. White.

Q. This Commission is not around trying to get people jobs, but certainly we feel that if a man is qualified he should be hired. That is our basis of determination. Now, you have already stated that he was qualified.

[fol. 360] A. That's right.

Q. Now we want to know why he wasn't hired if he had the qualifications?

Mr. McClearn: Mr. Chairman—and I don't mean to try to cut you off, Mr. White—but that question has been asked about six times and I think Mr. Bell has answered it fully to the best of his ability.

Chairman Miller: I think he has answered the question. It is a repetitious answer. Do I understand there were five of the fourteen?

The Witness: I believe there were six.

Chairman Miller: Six?

The Witness: I believe there were six.

Chairman Miller: And the other eight were found not qualified at that time?

The Witness: Yes. We reviewed the records that we had and so advised them.

Chairman Miller: What was the figure, was it six or five?

The Witness: Well, it is my recollection that 14 people were considered for this group. It was the first of a hiring drive. Of the 14, 6 were found to be qualified. We didn't know about all of them until sometime after Mr. Green appeared and then left. That was why we simply advised them all that they were not included in this July class. We

[fol. 361] didn't want to cut them off completely and have them perhaps go to another line if they were suitable. We didn't give them a flat rejection.

Chairman Miller: But eventually out of the 14, six were found qualified?

The Witness: Were found qualified.

Chairman Miller: And four placed in the pilot training class?

The Witness: Correct.

Chairman Miller: Was Bryant the sixth one?

The Witness: He was included in the six.

By Mr. Sayers:

Q. Mr. Bell, do you have anything to which you can refer that would indicate how many flying hours Mr. Bryant had?

A. No, not offhand I don't. His records, of course, would show that, or his log book.

Q. Do you have anything or do you remember how he compared as against Mr. Green, as far as qualifications are concerned?

A. They compared equally favorably, to my knowledge, as did all of those included in this one group. The qualitative valuation of a pilot has to be very limited for the reasons I mentioned, time, weather, as Mr. Green well knows or Mr. Cramp far better than those of us that aren't pilots. A man can look good 9 days out of 10 and on the 10th day runs into a situation that can't be fixed. That [fol. 362] is why the copilot is on probation for one year and subject to discharge without question at any time during the one-year period. He has no recourse to any grievance procedure, no argument whatever. We just don't think he is going to cut the mustard and out he goes. I am sorry, I will be more careful of words here.

You would like me to be able to say one man was 82 and another 83. We don't have such a measurement, and it would be very foolish. I am sure all pilots would concur in this, to have any sort of a pinpointed evaluation at the time of one check flight.

Q. Mr. Bell, I want to ask you this, perhaps you know.

perhaps you don't know. Do you know of any airlines that are presently employing Negro pilots?

A. No, sir.

Mr. McClearn: I don't believe that is within the area of this inquiry.

Chairman Miller: No.

Mr. Sayers: I believe that's all.

Chairman Miller: Any further questions? Let me clarify something, Mr. Bell. At the time of, well, last June or July, whenever it was Mr. Green's qualifications were admitted, he was placed on call, at least in the file, he was eligible; the factor that caused Continental to withdraw his name as one eligible was solely the matter of the adverse publicity?

[fol. 363] The Witness: Yes, sir.

Chairman Miller: And that didn't develop until the fall, September I think you said or August?

The Witness: August 6 I think we were made aware of this.

Chairman Miller: Yes, August.

Mr. McClearn: I wonder if I might ask one or two.

Chairman Miller: That's all right. Let's finish with Mr. Bell before the noon recess.

Redirect examination.

By Mr. McClearn:

Q. In your examination by Mr. Sayers, you discussed again this subject of the possible problem of cockpit harmony. How did that subject arise, Mr. Bell, in the course of the conversation, why did it come up?

A. Well, you have pilots from all over the country flying in any airline.

Q. No, I am sorry, perhaps you misunderstand my question. Did you initiate the question with respect to cockpit harmony?

A. Possibly, well, the answer to that would be Yes, because I was asked what sort of problems might conceivably arise in the industry.

Q. In other words, you got into the area of cockpit har-

mony discussion in response to an inquiry from Mr. Chapman, is that correct?

A. Yes, what problems would arise.

[fol. 364] Q. That wasn't in connection with your discussion about Mr. Green specifically?

A. No, Mr. Green's case had been discussed and we were, as I say, just spinning our wheels.

Q. In connection with your determination not to further consider Mr. Green, which you have stated was based upon the publicity he received nationally, would you have reached the same result with respect to, let's say, Applicant Bryant who was at that time an applicant, was he not, in early August?

A. That question was asked and the answer is definitely Yes.

Q. In other words, if Mr. Bryant had become involved not in a racial discrimination problem but if for any other reason he had achieved the same sort of national publicity, what action, if any, would you have taken towards his application?

A. Terminated it.

Q. Just as you did Mr. Green's?

A. Just exactly.

Q. And by the same token if Mr. Green had become involved in national publicity not having to do with his race, what action, if any, would you have taken?

A. The same.

Q. The same action that you did take, is that correct?

A. Yes. May I add one word. We have over the years terminated people who were being plagued by bill collectors. [fol. 365] They might be fine pilots, they are in training, but we have found it necessary to release them. Marital difficulties of one sort or another that hit the press.

Q. All right, sir. And you did testify, did you not, that applicant Bryant whom Mr. Green has stated was interviewed on the same day that he was and who was found to be equally qualified by Continental, was selected for training in the September 1957 class, is that correct?

A. Yes. He was part of this stockpile of eligible people.

Mr. McClearn: That's all, Mr. Chairman.

Chairman Miller: Would that be true regardless of whether or not the pilot was asserting, conscientiously or rightly, the thought he had, even if it were not in the area of discrimination or a breach of contract or personal injury suit which resulted in a great deal of publicity?

The Witness: I think, Mr. Miller, this is in all honesty a personal opinion, but the answer would have to be yes. If you have two pilots of equal qualifications, one receives some publicity, fairly or otherwise, I am afraid the one who had not, who was equally good, we would use. He is such a unique person in the public eye.

Chairman Miller: Well, does that affect the airline business, I mean what would be the reason for that, I mean excessive publicity, we will say.

[fol. 366] The Witness: Personal problems that he might have that would distract from his flying concentration would be one angle.

Chairman Miller: Reflecting upon his ability as a pilot?

The Witness: It would be that.

Chairman Miller: Does the matter of customer relations enter into the selection of the pilot?

The Witness: Customer relations?

Chairman Miller: Yes, I mean the physical appearance of the pilot?

The Witness: Yes, he comes through the cabin quite often. We encourage this. He talks to the passengers, often greets them at the steps, some airlines. He is an important figure in their eyes.

(Commissioner Manzanares entered the hearing room at this point.)

Chairman Miller: Was that considered in Mr. Green's case, do you know?

The Witness: Mr. Green's appearance speaks for itself. He is a nice looking person.

By Mr. White:

Q. Mr. Bell, do you discharge pilots or do you provisionally discharge them subject to appeal by their grievance committee?

[fol. 367] A. A probationary pilot, Mr. White, has no right to have a grievance procedure at all.

Q. Say one of these pilots was involved in one of these bits of notoriety you have been talking about, do you fire him or provisionally discharge him?

A. We will discharge—well, we have the right—we make a distinction here—we have the right to suspend and then bring charges or we have the right to fire, and when we suspend and bring charges the injured employee then has certain recourse to grievance machinery.

Q. He must have just cause?

A. Just cause, that's right.

Q. In other words, the arbitrator may say, then, you had no right to fire that employee?

A. That's right. He can be reversed.

Q. Have you ever fired one for a similar circumstance?

A. We have discharged probationary pilots the minute there is any slight hint of probation.

Q. Let's get off probation.

A. All right. You have a full seniority pilot. Yes, we have.

Q. Was it upheld by an arbiter?

A. Yes. We haven't for—there has been no similar case, to my knowledge, but there has been publicity that was not favorable to the pilot or to the airline that has caused us to [fol. 368] terminate a pilot and have his termination upheld.

Q. Can you relate what that was, I mean was it offensive to the morals of the community or such as that?

A. Automobile accident, drinking.

Q. You wouldn't compare that to a man asserting his rights under law?

A. No, I wouldn't, Mr. White, but as I said to Mr. Miller a moment earlier, if you had two people, one of whom who has not had a problem involving those rights and one who has, we don't attempt to be a judge but we do prefer, if the qualifications are equal, to use the one who has not.

Q. In your job as Vice President in charge of Personnel, is that a policy-making position?

A. To a limited extent a policy formation or recommendation, I do not make final policy.

Q. But your personal opinion would have a great deal of weight on those policies?

A. Yes, better be able to prove it.

Q. I am not trying to trap you on anything.

A. No, I know you are not.

Q. But when you were talking about the problems the airlines would have in general discussion with Mr. Chapman, cockpit harmony and—

A. Might have.

Q. I am just wondering if in the determination or selection of four out of five pilots, if those considerations wouldn't lend some weight to the hiring of an individual.

A. Not to my knowledge. We have attempted not to discriminate. We will welcome all applicants for any position, regardless of race, creed or color.

Q. Well, then, you would say that there would be no problem in hiring a Negro pilot?

A. The problem would not be such as to cause us to refuse to consider him or hire him.

Chairman Miller: I think maybe what Mr. White is asking, is there any specific factor in a Negro, the color of his skin or anything else, because he is a Negro, that would disqualify him in your consideration?

The Witness: No, nor in the consideration of Continental Air Lines.

Mr. Sayers: I should like to ask one more question, if I may.

Chairman Miller: Yes.

Recross examination.

By Mr. Sayers:

Q. Have you notified Mr. Green yet that he is no longer being considered?

A. No.

Q. He has not yet been notified of that?

A. No.

Q. How many of the minority group do you have employed at the Denver station?

Mr. McClearn: Well, now, excuse me. I think there would be a further definition required there.

Chairman Miller: Yes, I think you would have to differentiate.

Q. How many Negroes do you have employed at the home office here in Denver?

A. I honestly don't know, Mr. Sayers.

Q. Do you have any?

A. I don't know that. I believe we have some.

Q. In what type of work, if any?

A. We have one I know of who is employed as a trusted messenger. We may have mechanics. We have had office employees. To be very honest with you, we don't have very many candidates for employment. Every now and again Mr. McKinney, with whom you are acquainted, of course, refers some to us as an opening. We have made every effort to place them.

Mr. Sayers: That's all.

Mr. McClearn: In this connection, if I may.

Chairman Miller: Yes.

Redirect examination.

By Mr. McClearn:

Q. I note from the Commission's annual report that certain other minority groups are indicated, among whom were Spanish-American, persons of Japanese descent, and Jewish, persons of the Jewish faith. Will you tell the Commission [fol. 371] whether or not Continental Air Lines employs persons from those other so-called minority groups?

A. We will employ anyone who meets our job qualifications, whether Nisei or Spanish-American.

Q. Do you have such persons in your employ?

A. Yes. I don't know the numbers, but we do have them.

Q. Now, Mr. Bell, in answer to Mr. Sayers' question, if he asked you to go and find out how many colored persons you have employed or how many Spanish-American persons you have employed, how would you do so, or could you?

A. I don't know how we would do it without a question-

naire and I would certainly hesitate to do anything like that.

Q. Is there any information in your files, your personnel files, which indicates the race, nationality or religion of any of your employees?

A. No, sir.

Q. And this would, of course, be with the exception of the persons who were employed under the old form?

A. On the old form, of course.

Mr. McClearn: That's all.

(Witness excused.)

Chairman Miller: If there is nothing further, then, we will recess until 2 o'clock.

(Whereupon, at 12:15 p.m. a recess was taken until 2:00 p.m. of the same day.)

[fol. 372]

AFTERNOON SESSION

2 p.m.

(Mrs. Paul Budin was absent from the afternoon session, Mr. Gene Manzanares was present.)

Chairman Miller: Are we all here? Did we finish with Mr. Bell?

Mr. McClearn: Yes.

Chairman Miller: All right. Your next witness?

Mr. McClearn: The Respondent rests, Mr. Chairman.

Chairman Miller: Respondent rests.

Mr. Sayers: Mr. Chairman, I would like in rebuttal to call Mr. Green for just a question or two.

Chairman Miller: As many as you like.

MARLON DEWITT GREEN, having been previously sworn, was recalled and testified as follows:

Direct examination.

By Mr. Sayers:

Q. Mr. Green, you have heard testimony this morning concerning the newspaper article that you gave to the A. P. Do you have a copy of that article?

A. I would like to correct in my answer that the article was not given directly to the A.P. by myself. It was given directly to a reporter of the Lansing State Journal, Lansing, Michigan. He wrote his article based on my information, and a copy of his notes and his final article was submitted to the Associated Press, and the article, to my knowledge, [fol. 373] the article which appeared in the Albuquerque paper must have been a result of the release by the A.P. based on the Lansing State Journal information.

Mr. Sayers: May I have this marked Complainant's Exhibit 11?

(Complainant's Exhibit No. 11 was marked for identification.)

By Mr. Sayers:

Q. Mr. Green, I ask you to look at Complainant's Exhibit 11 and tell us what it is.

A. This is a copy of a news article which appeared in the Lansing State Journal, issue of Sunday, August 4, 1957, written by Mr. Frank Hand.

Q. And is this article based upon information that you gave to Mr. Frank Hand yourself?

A. That is correct.

Q. And the articles that you have heard discussed this morning about being in the Albuquerque paper, would it be likely to be based on this same information?

Mr. McClearn: Please note our objection.

Chairman Miller: Yes. Read the last question, please.

(Question read.)

Chairman Miller: I think that is a little broad. I think if you confine it more specifically. You might ask him if he is familiar with the Albuquerque article.

[fol. 374] Q. Mr. Green, are you familiar with the article that appeared in the Albuquerque paper?

A. I have not seen this particular article. However, on August 4 this same information, based on this article, was carried by local newspapers in numerous cities throughout the country, to my knowledge. There were possibly more than I know of.

Mr. Manzanares: Was there a clipping out of the Albuquerque paper submitted this morning?

Chairman Miller: No.

Mr. McClearn: We will stipulate that the Albuquerque article was similar, at least, in nature to the Complainant's Exhibit No. 11.

Chairman Miller: All right.

A. I can offer here as information that I have in my possession now a copy of this same information which appeared in the Hartford Courier, and I would guess that it would be very similar in nature to the information which occurred in the Albuquerque paper, assuming that they are all based on this article.

Chairman Miller: I assume the stipulation is to the effect that the article in the Albuquerque paper is in effect similar to this article.

Mr. McClearn: That is correct, sir.

Mr. Sayers: We would like to offer this.

[fol. 375] Chairman Miller: It may be admitted.

(Complainant's Exhibit No. 11 was received in evidence.)

Mr. Sayers: Shall I read it?

Mr. McClearn: It is before the Commission.

Chairman Miller: The Commission can read it.

Mr. Sayers: I believe that is the only thing I wanted to bring out with Mr. Green.

Mr. McClearn: No questions.

(Witness excused.)

COLLOQUY

Mr. White: Is the Chief Pilot going to be back this afternoon?

Mr. McClearn: No. We have rested our case, Mr. White.

Mr. White: I would like to talk to him as a witness.

Chairman Miller: Is he available?

Mr. McClearn: I don't know whether he is available or not. I might say for the record that at Mr. Chapman's request we brought Mr. Cramp to the hearing and he was present yesterday and this morning, as the Commission knows. When the Complainant rested his case we saw no reason to retain Mr. Cramp. The testimony which Mr. Green gave yesterday concerning his conversations and interview with Mr. Cramp was, so far as we are concerned, truthful and accurate, and there was no need for us to present cumulative testimony on the same point.

[fol. 376] Chairman Miller: He wasn't subpoenaed, was he?

Mr. McClearn: He was not subpoenaed.

Chairman Miller: Unless there are some further questions you may have of Mr. Bell.

Mr. White: How about Mr. Sorby, can we talk to him?

Chairman Miller: You are not planning—they have rested. Is there any objection to Mr. Sorby being sworn?

Mr. McClearn: Only insofar as, Mr. Chairman, we think we have a right to rely upon the complainant's presenting its case. Certainly Mr. Sorby has nothing to hide, but I would think it would be unusual to reopen the hearing after both parties have rested except for rebuttal testimony.

Chairman Miller: Well, I don't think both parties have rested, I mean the rebuttal hasn't.

Mr. McClearn: No, the rebuttal is open, of course.

Chairman Miller: You see, we are not bound here specifically by the rigid rules.

Mr. McClearn: I understand.

Chairman Miller: There may be some questions in the minds of some. Maybe Mr. Bell can answer these questions.

Mr. McClearn: If the Commission desires to call Mr. Sorby, he is sitting in the room and I have no objection to his being called.

Chairman Miller: If that is agreeable to you, Mr. White, if you have some questions.

[fol. 377] Mr. White: Isn't he closer, actually, to the Chief Pilot's information than Mr. Bell would be, normally? I mean in regard to the hiring of these people. I am interested in continuing the conversations on why these four particular people were hired and who did the actual hiring and upon what basis. I am not satisfied in my own mind yet that these four showed superior qualifications to Mr. Green, and that is one thing that we have to determine in this hearing.

Mr. McClearn: I think that the testimony on that point is clear, Mr. White: There is no contention by the company, and I will so stipulate if you desire, that the four who were selected had qualifications superior to the two qualified pilots who were not selected. I think that that testimony is just as clear as it can be and he can admit it if that is necessary.

Chairman Miller: I think what Mr. White has in mind, if I may, is the question of comparative qualifications without their being qualitative, as to why a decision was made that these four are superior to the other two, who are also qualified, eliminating the eight who were not qualified. I mean, out of the fourteen, 6 were found to be qualified and 4 apparently were found to be better qualified than the remaining two, the question being, I am sure, in the minds of some of the members of the Commission, what is the basis for saying that they are better qualified than the two who [fol. 378] apparently were qualified.

Mr. McClearn: If I recall Mr. Bell's testimony on the point, there was no particular reason for selecting any four out of the six, that once a pilot was considered to be qualified for employment he was just qualified for employment and whether he was selected for the next class or for subsequent classes was simply a matter of random selection.

Chairman Miller: Well, that's the factor that still remains hazy, I think.

Mr. White: Isn't that poor business practice? If I were an agent hiring, I think I would attempt to hire the best qualified, and that's the basis that we have to judge this case on.

Mr. McClearn: Well, my point, Mr. White, is this, that you will have to draw your own conclusions from the evidence, but I don't think it is within your prerogative to challenge company policy unless it violates a law, and I think the testimony in the area into which you are inquiring has been full and complete.

Chairman Miller: No, so far as policy is concerned, that is correct, but I think what the inquiry relates to is an analysis of those factors which enter into the decision in determining that A or B are better qualified than E or F. In what respects are they better qualified? When we know that six are qualified to do the job, what are the particular [fol. 379] factors affecting E and F which say they are not as well qualified as A, B, C, D?

Mr. McClearn: That's right, Mr. Miller, and—

Chairman Miller: Excuse me. I don't think this is a matter of, maybe in a sense it is company policy, and yet it is factual, bearing upon the issue.

Mr. McClearn: It was my understanding of Mr. Bell's testimony that once you reach the point of minimum qualification, in other words, that a pilot was qualified to be employed, that there was no basis for selection out of the so-called pool of qualified pilots.

Mr. White: He also testified that one had more than the minimum qualification, in fact, he had more than that number that was disqualified; he said he had been a senior pilot with maybe 7,000 hours and they felt perhaps he shouldn't be hired because he might not take orders as readily, being a senior pilot at one time.

Mr. McClearn: But he is not in this category, Mr. White. He is one that is rejected. He is not kept in the so-called employable pool.

Mr. White: But he met all the minimum qualifications.

Mr. McClearn: No, if you will, he failed—

Chairman Miller: He over-met them.

Mr. McClearn: He over-met them, but he was still not minimally qualified.

[fol. 380] Chairman Miller: I think that's right. Is there any objection to asking Mr. Bell these particular factors?

Mr. McClearn: No.

Mr. White: I would like to ask Mr. Bell or Mr. Sorby,

either one who would like to answer this, if Mr. Green showed superior qualifications over the four that were hired in certain areas, certain fields, of his test.

Mr. Bell: No such evidence available. I think that maybe the best way of explaining to the Commission about what we are doing here is similar to the admission of a student at college. He meets certain requirements and he is admitted. Whether or not he graduates is something else again. During the training period there is continuing evaluation of his performance, but you are either in or you are out on the basis of a flight check, and no great stress is placed on the flight check other than coolness and so on. He is put through certain maneuvers, but as you can see, I mentioned it earlier, your flying conditions, VFR, are entirely different than if it was purely visual flying. So you can't do any more than say, "This individual can keep it straight up and the other one can't."

Then you get a pool of these people available. We will in a sense take some, perhaps, who are immediately available; we wouldn't consider somebody who said he wasn't available for a month. But you don't have the sense of a [fol. 381] qualitative evaluation which I think is what you are looking for, Mr. White, that this man is good on take-off, he is better than another man on a landing, or something like that. It isn't quite done that way.

Chairman Miller: Who made the final decision as to the hiring of the four?

Mr. Bell: I think it is safe to say that as we reached for the first—or the first four in a pile were taken and that's all we were going to use. The subsequent classes might be larger, but all that we had room for and intended to train at that time would be four.

Chairman Miller: I mean what individual in the Continental organization would say with authority, "These are the four that we want"?

Mr. Bell: Well, it might be—we are still after, I say, a qualitative evaluation; I want to be somewhat careful of that. Which of the four eligible or six eligible will we use? It might be the first four. And it might be the Director of Flying, I am using titles not current any longer, it might be the Vice President of Operations, it might be verbal

instructions to our department to call in the first four people, the first three or whatever, "let's get them in training." It is somewhat informal.

Chairman Miller: Do you know in this case who made the decision with respect to the selection of the four?

[fol. 382] Mr. Bell: No, sir, I don't know exactly who made the decision

Mr. White: Mr. Sorby, did you make it?

Mr. Sorby: No.

Mr. Manzanara: He hasn't been sworn yet, George. Before we get off on that, may I ask Mr. Bell a question on that? Without questioning the policies of eligibility or the selection, I want to get away from who decides which ones are eligible. We will assume six of them are eligible for pilot training and four were to be selected. Somebody has to make the selection. Your method I don't particularly care about, but there has to be some method. Do you throw them up in the air, throw the names up in the air, and the four that you catch in your hat are the ones, or what? There has to be some selection, isn't there, in an organization like that?

Mr. Bell: Well, I don't want to sound too haphazard, but it is quite informal. If you have seven openings and ten available applicants, it might be—we will be asked, "How many do you have? Bring in seven." It might be the first seven. They might be in any order. They might be out of order. The last seen might be the first called in rather than the first seen. Unless a person is clearly not acceptable, we've just got them in a pile.

Mr. Manzanara: You say we don't want that guy or we do want this guy and any other six applying that are [fol. 383] available?

Mr. Bell: The reasons for this is the latitude of the training period where we will dismiss people out of the classroom.

Mr. Manzanara: The next step, you figure something else will happen in that next step?

Mr. Bell: Yes. And, of course, during their probationary period as pilots, which is one year. You are familiar with all the rules of probation.

Mr. Manzanares: There is no selection procedure, as such, by the company?

Mr. Bell: Nothing particularly formal or organized. You have got a pool of people—call in four, call in five, call in six.

Mr. Manzanares: What happens then? An order has been given to someone, I assume, to bring in four. Is it up to that person, then, to decide which four he brings in?

Mr. Bell: We might be told to bring in four. We might have all the applications in our own office. They might have them and say, "Bring in A, B, C and D." We will send the rest back and call them later. There isn't any selection in the sense if there is any doubt about a pilot, that's it.

Mr. Manzanares: Sure, I understand.

Mr. Bell: So all others are treated equal until they prove they aren't equal.

[fol. 384] Mr. Manzanares: Until you select, and then there doesn't seem to be a pattern of selectivity at all. They are able up to that point.

Mr. Bell: They either have made the grade or they haven't, and then during the training and selection period, that's where your real selection comes in.

Mr. White: Have you got that list so we can see whether Mr. Green was either fifth or sixth, have you got that list at all?

Mr. Bell: No, Mr. White, we haven't any list like that.

Mr. White: Well, you had to keep their references, didn't you?

Mr. Bell: Yes, but there isn't any rank order in the list. We know who was involved at that time.

Chairman Miller: In other words, six were eligible and eight were not, and the six were not in order of any priority or sequence?

Mr. Bell: That is right.

Chairman Miller: When you say they told somebody to call in four, whom do you mean by "they"?

Mr. Bell: They would be the Operations Department. It could well be the clerk responsible for signing people to the class. We know how many requisitions there are. We know how many class positions there will be. That's all.

[fol. 385] We are just told to bring in four, five, six.

Mr. McClearn: I wonder if I couldn't add something to this. In the Operations Department, for example, there are certain people who have responsibilities who might say, "Bring in X number of pilots for training, is that correct?"

Mr. Bell: Yes.

Mr. McClearn: And that someone in the Operations Department would communicate with the Personnel Department, but the person in the Operations Department who communicates with personnel is not the so-called policy-maker, it is one of his subordinates?

Mr. Bell: Could be anyone. All we are waiting to hear is how many of these that have been tested and tried out they want, and how soon until we can arrange for physical exams, that's all.

Mr. Manzanares: Then we are past the place where Operations needs X number of pilots and they make the request of personnel; now we are to that point who in personnel, or rather, whoever makes the selection of personnel, what procedure do they use?

Mr. Bell: Take four, if you can conceive of a folder—

Mr. Manzanares: If you have a list you might take the first four or last four?

Mr. Bell: No order.

[fol. 386] Mr. Manzanares: That's the way it is.

Mr. McClearn: Let's develop that a little bit along Mr. Bell's thought, I think.

You don't have a list, as such, you have stated?

Mr. Bell: No.

Mr. McClearn: What do you have, you have a file?

Mr. Bell: A folder.

Mr. McClearn: Of eligible applicants, don't you?

Mr. Bell: That's right, we have a folder of eligible applicants.

Mr. White: Then is it possible for whoever goes into that folder to read the names and then discriminate on that basis?

Mr. McClearn: Is that question clear to you?

Mr. Bell: No.

Mr. White: All right. Say somebody has to go into that

folder. Now, so far we don't know who does that, you haven't given us the name that actually goes in the folder.

Mr. Bell: I might do it myself.

Mr. White: Is it possible at that time, knowing Green is a Negro, going into that folder to pick other than his name on that basis?

Mr. McClearn: I think the question answers itself, of course it is.

Chairman Miller: Yes, that is possible, I would answer [fol. 387] it.

Mr. Manzanares: You have no method of preventing it, either, do you?

Mr. Bell: No.

Mr. Sayers: I should like to ask Mr. Bell a question if I may. Was Mr. Green one of the six who was in the folder in the first place, would you say?

Mr. Bell: Yes, I would say that. I would say that we had—Mr. Green was included with a number that we had not yet made up our minds about, that we subsequently disqualified completely.

Mr. Manzanares: Have you always hired like that?

Mr. Bell: It does sound a little—

Mr. Manzanares: Sounds rather haphazard.

Mr. Bell: Sometimes it is.

Mr. Manzanares: I don't know anything about the flying business, but it sounds rather strange if it has always been that practice.

Mr. Bell: Well, we are small, to begin with.

Mr. Manzanares: I realize those guys are supposed to be good men, all six of them, so you are pretty sure anyone you select of those six is going to be good from a qualification standpoint, but—

Mr. Bell: Our job is done once we have the eligible people produced, found to be eligible, whatever the job might be.

[fol. 388] Mr. McClearn: Mr. Manzanares, I am afraid you are putting us in a position which we don't like to be, of classifying our pilots as bodies, eligible bodies or ineligible bodies.

Mr. Manzanares: I don't mean to. I can't find a point from which you are operating according to any kind of a

procedure, although you don't have to. As I mentioned a little while ago, you could throw the names in the air. It is your business to select in any manner you see fit. But as yet I haven't been able to find a procedure of selection in any way whatsoever.

Mr. Bell: It is not a refined procedure. I think as we get larger we are going to have to make some changes, there is little doubt of that. I have been connected with a company employing over 100,000 people and I hesitate to think what might happen if we ran on that basis with that company, but as it is, being located where we are, Continental up to now has been very fortunate in having available all the applicants it needs for a job. Let's hope it continues. We have the advantage of our location and size, and the fact that our pay scales are competitive, regardless of the classification of work.

Mr. White: This clerk or bus boy, whoever it might be you send to the files, at this point couldn't that picture that is attached to that application definitely act as an instrument of discrimination?

[fol. 389] Mr. McClearn: Again, I think it answers itself. In this instance there was no picture. If a man was going to discriminate because he was a Negro, of course he could, Continental could or anybody else to whom Mr. Green applies.

Mr. White: Another question. Your chief pilot, or check pilot—I keep getting the terms mixed—check pilot. Has he done that job for some length of time?

Mr. Bell: Many years.

Mr. White: He is familiar, then, with both application forms, the new and the old?

Mr. Bell: I presume so, though he has seen very, very few of the old ones.

Mr. White: He knows your new hiring practice or new application form omitted "race" on it?

Mr. Bell: I have the feeling he never would have noticed it at all. The changes were made by us quite a number of years ago for simplicity and efficiency, and to get rid of useless information.

Mr. White: But he did pick out that one item that wasn't filled out and specifically requested—

Mr. Bell: It was an incomplete form.

Mr. White: But he knew the difference between the two forms, or should have, anyhow.

Mr. Bell: I have a feeling that he didn't. I think any one of us that are used to applications might have, but I [fol. 390] don't know that he did at all. I think he just saw an open blank.

Mr. White: He should know the policy of the company by this time, though, that it was useless information that had been dropped because it was superfluous.

Mr. Bell: Well, being useless we certainly didn't put out a bulletin to the effect that we were not including that on an application. We said, "Get rid of all old applications." One place it wasn't done. Mr. Green unfortunately found it.

Mr. Manzanares: I would like to get back to this other again. This is Complainant's Exhibit No. 9, the General Policy Plan of the Continental Air Lines. Under the "C" heading, "Responsibility for selection", it says this "The Department Head or his designated representative will select from the applicants referred to him by the Employment Manager the individual best suited for the position." Now, that says that there is somebody who makes the selection.

Mr. Bell: You might look at that as being a secretarial position or any kind of a job. That doesn't just relate to pilot employment. We have one job open, we send five applicants, they meet our approval or they wouldn't have been sent for. He approves, then, the one he wants. Pilots, it is in slightly larger numbers when the time arrives that we are employing pilots.

[fol. 391] Chairman Miller: I think what may be a factor here which the Commission is groping for, the answer one way or the other, is to pinpoint the particular individual who made the decision to select these four and why he selected those four.

Mr. Bell: I realize what they want. I am having difficulty explaining how it could work as it does where you have got a pile of X number of suitable people.

Chairman Miller: Excuse me, Mr. Bell.

Mr. Bell: Oh, I am sorry.

Chairman Miller: We are talking about these particular six and what was the fact with respect to that situation last June or July when the six were there. Who was the man who said, "We want four", and who was the man who picked the four?

Mr. McClearn: Mr. Chairman, hasn't that been answered by saying, you just don't know?

Mr. Bell: I don't know.

Chairman Miller: That is one of the disturbing factors. That leaves it rather vague.

Mr. McClearn: I wonder if I could develop that a little bit?

Chairman Miller: Yes.

Mr. McClearn: You have testified that during at least several of the months of 1957 this process apparently took place, the process of selection of some out of a larger group [fol. 392] of qualified applicants for training, is that correct?

Mr. Bell: Yes.

Mr. McClearn: And if I further understand your testimony, this perhaps has happened at least in the past years over a period of time?

Mr. Bell: Yes.

Mr. McClearn: And is it my further understanding of your testimony that who performs this so-called selection process for any given month or any given period is not the same person from time to time?

Mr. Bell: No.

Mr. McClearn: That was my thought, Mr. Miller.

Chairman Miller: And there, of course, is nothing in the record to indicate who did it this particular time. You say you don't know.

Mr. Bell: Mr. Miller, we weren't building a record to defend ourselves in a discrimination case, I think that should be brought out here. We were following our normal method of operating.

Chairman Miller: Mr. McClearn, does Mr. Sorby have any information on that point?

Mr. McClearn: Not to my knowledge, but if the Commission would like to interrogate him I would have no objection.

Chairman Miller: We would be very happy to if it is [fol. 393] agreeable to you. We will swear Mr. Sorby. I take it it is agreeable if the Commission inquires.

Mr. McClearn: Yes.

KENNETH C. SORBY, was sworn and testified as follows:

Direct examination.

By Chairman Miller: ○

Q. Your name?

A. Kenneth C. Sorby, S-o-r-b-y.

Q. Your occupation?

A. Employment Manager and Employee Relations. Official title is Manager, Employment and Employee Relations.

Q. Of Continental Air Lines?

A. Right.

Q. Were you so employed last year at the time that the complainant here applied at Continental?

A. That's right.

Q. Did you have any particular dealings with Mr. Green at that time?

A. Particular dealings? No, I wouldn't say so, Mr. Miller. I met him, as has been brought out here earlier. I handled this application from time to time right along with the applications of other personnel we were considering for employment.

Q. Did you have occasion to handle his application subsequent to the time he was put upon the eligible list?

A. I would say I did. As a rule, the applications of [fol. 394] those individuals approved for employment are returned to our office and I or possibly others in the office, clerks in the office, would have handled the application to get them in the proper files, etc., yes.

Q. Did you have anything to do with the selection of the four out of the six eligible applicants last summer for this particular copilot training school?

A. Insofar as designating which people were to be selected, no.

Q. What, if anything, did you have to do with it, those six applications?

A. Well, the things that I have to do with them, of course, involve directing the clerks in the office to handle reference checks, investigations, history, and so forth, the handling of the files. I do not recall specifically directing anyone to handle an investigation of Mr. Green's application, but there are an awful lot of applicants that I do handle through the period of the year, and to fish one out in detail I am sorry I couldn't say.

Q. Do you know who did handle the procedure of the selection of the four out of the six?

A. No.

Chairman Miller: Have you any other questions?

By Mr. White:

Q. Do you have any personal knowledge of Green filing [fol. 395] cases in other States alleging discrimination before his June appearance?

A. No.

Q. Did you know that Green was a Negro before he came?

A. Before he came to Denver?

Q. Yes.

A. No.

Q. When the four pilots were needed for the schooling, is it your Department that the information is requested— Well, let's put it this way: If there are four pilots needed, it is up to your department to furnish those four pilots, is that correct, that information request comes to you?

A. It is up to our Department to supply likely applicants for positions in the numbers necessary to give the operating departments a chance to make a selection, to run through interviews, to conduct tests, etc.

Q. Does that request come directly to you over your desk?

A. Yes, I get the orders from the Operating Departments indicating that they need so many personnel in such and such classifications, yes.

Q. Who do you give that order to go select the four?

A. I keep that. It is retained right in my section.

Q. No, let's put it this way: After you get this order for four pilots and somebody has to give an order to go [fol. 396] pull four applicants' files for training, now, who is immediately responsible to you for that selection? You just don't hand it to a girl who sharpens pencils in your office or something? I don't think you have made that record on safety in your airline that way, I am sure of that.

A. Let me stray away from this pilot thing for a moment. In my position I handle employment procedures in all phases of the company, whether they are hostesses or mechanics or agents or sales people, etc.

Chairman Miller: But including pilots?

A. Including pilots, yes. We have not an overly heavy amount of turn-over in the company, but we have been growing in recent years, so we have had a good deal of activity in employment. Our last flurry of employment, this might bring out a point, has been in the classification of what we call passenger agent or reservation agent. These are ground employees working at offices all over the system. The Operating Department in that case, Passenger Service Department, supplied a representative to travel with me at that time. We visited several training schools in various cities. We interviewed collectively, I would say, about 200 applicants, 200 people who were graduating from training schools, male and female, for positions that we had anticipated openings for. At the time the openings developed, shortly after that, I wouldn't even guess at how many we needed, maybe we needed 30 people; as a result [fol. 397] of our interviews at these schools we had determined which people we felt were best qualified on all the bases we used for determining qualifications of ticket agents, reservation agents, etc., voice, telephone voice, speech, and things of that sort. We had quite a number of people on our list that we thought or we felt were qualified to do the job. We went down the list on these things. We contacted the schools by mail, telling them we would like such and so persons to report for physical examinations and report for duty and for training.

In one particular case, with one of the schools, I think it occurred with others, we said in the event some of these

people have changed their minds, the following names can be considered as approved by us for employment, we would be interested in any of these people. In a way there, you might say we almost left it up to the school to pick our people finally. We had interviewed them all and we supplied the names of people whom we thought best met our qualifications. From that point on in supplying the school with names we were identifying people we felt would be approved but we were covering ourselves to the extent that in the event some of these people rejected our offers of jobs, we would still give the school the opportunity of placing others with us. That's a long ramification, but I think it explains our situation.

By Mr. White:

Q. Do you remember this particular order for four pilots, [fol. 398] then, in June?

A. Do I remember the order for four pilots? You are going back again to the point where they have already been screened and we have six men to select from?

Q. Yes.

A. I can't say that I specifically recall who contacted us, whether I was contacted by telephone. Again, our office is about three and a half miles from the airport and our contacts are by phone. I couldn't really say here now who contacted us, who they contacted in our office. It could have been myself, it could have been one of the clerks in the office.

Chairman Miller: And you testified that you don't know who made the selection of the four?

The Witness: I can't remember that, that's correct, Mr. Miller.

Chairman Miller: Let me ask you on pilots, do you also have lists, or is it just files?

The Witness: It's a file. In the case of the school that I was referring to there were quite a number of them. In the pilots' case it is much more limited.

Chairman Miller: And in these files of the six there was no particular sequence or priority?

The Witness: No.

Chairman Miller: There were six eligible?

The Witness: That's right.

[fol. 399]

By Mr. White:

Q. What brought it to your mind when you read that article in Albuquerque, the Albuquerque Journal, that immediately it was remembered by someone that Green's name was in the file?

Mr. McClearn: I don't think the testimony is that that reference was made by Mr. Sorby. Mr. Bell testified.

Q. Aren't you the gentleman who is in charge of the employment and hiring, etc.?

A. Under Mr. Bell. I work under Mr. Bell, his direction.

Q. Who pulled—let's put it this way: Who pulled Green's name out of the file on the information of this news letter in Albuquerque?

A. As a result of the newspaper item in Albuquerque, I received instructions from Mr. Bell to eliminate his application from the active file of pilots.

Mr. White: I am not doing very good.

Mr. Manzanares: That is the first indication we have had that some definite action was taken.

Chairman Miller: No, you missed that this morning. Mr. Bell testified.

Mr. Manzanares: That that order was given?

Chairman Miller: Yes, when he saw the article in the Albuquerque paper he directed that Mr. Green's application be withdrawn.

[fol. 400] Let me summarize my own impression. If I am not correct, you tell me, but so far as these six eligible names were concerned, they were not names, they were files kept segregated as eligible, with no priority attributed to any one or more of them, and that an order came from Operations, I take it, for four names for the copilot training school, and somebody, presumably in your department who is unknown, selected the four and did not select Mr. Bryant or Mr. Green, is that correct?

The Witness: That's correct, as well as I can remember, Mr. Miller, yes.

Mr. Manzanares: How was the order—I suppose it was testified to by Mr. Bell, but the order to Mr. Sorby to eliminate Green from the file as a result of certain information, was that a verbal order, by telephone?

Mr. Bell: I wrote it on a piece of paper.

Mr. Manzanares: You wrote a memo, I see.

Mr. Sayers: I should like to ask a question.

Chairman Miller: All right.

Cross examination.

By Mr. Sayers:

Q. Mr. Sorby, I understand that Personnel will interview the applicant as to his qualifications, etc.?

A. That's true to a great extent, yes.

Q. Is that your personal job?

A. Yes.

[fol. 401] Q. Did you have such an interview with Mr. Green?

A. A very limited interview. It isn't essential that we interview each individual. We generally do, I would say that.

Q. But you would say you didn't do that in Mr. Green's case?

A. I met him, had the opportunity to chat with him for a few minutes.

Q. Where did you meet him?

A. I believe it was in the Continental cafeteria at the airport. I ran over there for lunch.

Q. Do you usually have your interviews at the cafeteria?

A. No.

Q. Where do you usually carry on the interviews with the applicants?

A. I have an office about three and a half miles from the airport area and the majority of my interviews are in this office, although at other times I will interview at the hangar office; at other times my interviews are conducted anywhere in the country wherever I happen to be.

Q. How does it happen that you didn't interview Mr. Green as you would the other applicants?

A. Well, as I mentioned, we do not necessarily interview each and every individual. There are quite a few people in the company that I have not personally interviewed. This [fol. 402] isn't a necessary requirement. We have the opportunity of reviewing applications, paper applications, and if we have a rather incomplete application, one of my major items of work, actually, is making sure that applications are complete. As, for example, in the case of past work records, it is my duty to make sure that I get sufficient information from the applicant to know that we will be able to use his supplied information in reference checking. One of the major items in my personal conversations with applicants, when time permits I will sit down and chat with the applicants for some time in order to enlighten them about any questions he or she might have about the company. However, that material is all covered through our training programs subsequent to interviews, the indoctrination program within the company, etc.

Q. Has your office yet notified Mr. Green that he is no longer eligible for the job?

A. I don't believe we have.

Q. Do you ordinarily notify applicants if they are not going to be selected or are not eligible?

A. Not in all cases.

Q. In some cases.

A. In some cases, yes.

Mr. Sayers: I believe that's all.

Chairman Miller: Any further questions?

By Mr. Manzanares:

[fol. 403] Q. Is there a continuous file kept regarding applicants that did not make the grade at one particular time, are they kept in an active file, or do you start all over again for the next school?

A. We have a file cabinet loaded with applications of people who have requested employment. These people in many cases are qualified; where we do not have jobs, we have those applications in the files. Normally—

Q. Excuse me for interrupting. I am referring only to

pilots. I am not concerned with the others, but regarding pilots do you keep an active file?

A. Yes, we keep an active file of pilots. If a man has, oh, say on the paper application he does not have the necessary qualifications, if he is close to these qualifications we will keep his application on tap. In the event a man is not qualified at all, say we have a fellow who is 33 years of age applying, we will not keep him in an active pilot file by any means, because we don't feel he will ever qualify. We don't feel that regulation will change with the company. We do keep applications, as a rule, approximately six months.

Chairman Miller: I take it Mr. Green's application file is not an active one?

The Witness: I beg your pardon?

Chairman Miller: I take it that Mr. Green's application file is not an active one?

[fol. 404] The Witness: Not at this moment, no.

Redirect examination.

By Mr. McClearn:

Q. Mr. Sorby, how many applications, approximately, will your office receive during the year?

A. I am sorry, I'd have to make an awfully wild guess. It would be thousands.

Q. That's sufficient. Now, with respect to the interview which is apparently sometimes given to pilot applicants and sometimes not, there has been testimony which you have heard as to the areas or factors which the airline is looking for in its pilot applicants. Are pilot applicants given an interview with someone in the Operations Department?

A. Yes, as long as they—

Q. I mean when they are brought to Denver.

A. If we are specifically bringing them to Denver, yes, they are brought to Denver primarily for that purpose.

Q. So that they are interviewed insofar as pilots are concerned at the Operations level?

A. Correct.

Q. And it is the man from Operations, who does the interviewing, is it, who makes the primary determination as to attitude, personality, judgment, etc.?

A. Yes, the pilot job is a job of high importance.

Q. You do not pass upon a pilot's qualifications, at least in any subjective way? Is my question clear?

[fol. 405] A. Not entirely.

Q. Let me put it this way: Your function in reviewing applications for pilot positions, is it limited to a review of the paper application?

A. Primarily.

Q. In other words, you look to see that there are certain minimum qualifications, such as age and a statement regarding licenses, etc.?

A. Height, etc., yes.

Mr. McClearn: That's all.

Mr. Sayers: I should like to ask one question.

Recross examination.

By Mr. Sayers:

Q. Did Mr. Green get this interview or this final test you have just been talking about, was he given such a test?

Mr. McClearn: Perhaps I was misleading. I didn't mean to indicate it was a final test.

Mr. Sayers: I mean the interview that we have just discussed, did Mr. Green have that?

Chairman Miller: He testified to that, yes.

The Witness: All you have to do, I think, is shake hands with this fellow and you realize you have a pretty good boy. He is very friendly. I have been impressed with him right along.

Chairman Miller: Any other question? If not, thank you very much, Mr. Sorby.

[fol. 406] (Witness excused.)

COLLOQUY

Chairman Miller: Do you have any further witnesses in rebuttal?

Mr. Sayers: I think not.

Chairman Miller: None at all. That concludes?

Mr. Sayers: This concludes as far as I know. There are a lot of questions, but it would just carry on.

Chairman Miller: No use going over the same thing again.

Mr. Sayers: May we have a short recess? Some of the fellows seem to think there might be something else.

Chairman Miller: All right. Let's take five minutes.

(Recess taken.)

Mr. White: I would like to ask Mr. Bell two questions. Mr. Bell, I would like to know what the company's minimum requirements are to be accepted as a candidate for pilot training.

Mr. Bell: Under 30 and over 21, five-eight, and, informally, under six-two. I say informally; we have pilots that are that tall but we prefer them shorter than six-two. You might as well say six feet two—

Mr. White: Or under?

Mr. Bell: Yes. 2,000 hours, of which a reasonable proportion is in multi-engine equipment.

Mr. White: You set a minimum on that?

[fol. 407] Mr. Bell: We will hire people with less than 2,000 hours, which isn't a problem here, of course, but we prefer 2,000 with as much multi-engine as we can get.

Mr. White: Is there a minimum on multi-engine?

Mr. Bell: It is informal, Mr. White.

Mr. White: As long as they have multi-engine?

Mr. Bell: Two hours isn't what we are looking for. It is elastic, again. Wait until they get in the three figures anyway, the time; it is all expressed in hours.

Mr. White: Over a hundred hours, you mean?

Mr. Bell: Over a hundred hours, I think that's safe. One more thing, with jets on the horizon, of course jet time is very interesting to us, too. A jet pilot is going to be a very expensive item to check out.

Mr. White: Now, can you tell me if all six of the applicants met all these minimum requirements?

Mr. Bell: Yes, or they wouldn't have been considered.

Mr. White: Specifically, Bryant—was his name Bryant?—did he have a satisfactory number of hours on multi-engine?

Mr. Bell: Yes, Mr. White, or he wouldn't have been kept in an eligible file.

Mr. White: I would like to switch and ask Mr. Green a question.

Chairman Miller: Ask who?

[fol. 408] Mr. White: Mr. Green.

Did you have conversations with this Bryant?

Mr. Green: As related in my testimony, I did, sir.

Mr. White: How many hours did he say he had on multi-engine?

Mr. McClearn: Please note our objection to that.

Chairman Miller: I think you may cross-examine him. It is one of those cases which is hearsay, but the rules will permit, I think.

Mr. White: If this man's records are here available I can forego the questioning. Have you got Bryant's application records?

Mr. McClearn: No.

Mr. White: That is the only way I can get it.

Chairman Miller: Go ahead.

Mr. White: Did Bryant indicate to you how many hours he had on multi-engine?

Mr. Green: I believe I stated in my testimony I recall Mr. Bryant saying he had no hours in multi-engine aircraft.

Chairman Miller: No hours?

Mr. Green: As I recall our conversation, he said he had no hours in multi-engine equipment. In other words, he had been flying, his flying experience was in single-engine airplanes only, or possibly four-engine airplanes, but no—[fol. 409] Well, I wouldn't even include that, because that would be multi-engine.

Chairman Miller: Multi-engine is four engines.

Mr. Green: Multi-engine would be more than one, and

I would say, then, that Mr. Bryant indicated to me that he had no multi-engine flying experience.

Chairman Miller: Am I to assume, then, that the planes he flew were single motor planes?

Mr. Green: That was my impression entirely.

Chairman Miller: That is your impression.

Mr. Bell: May I say here, it is possible that ~~that~~ could happen, but very, very unlikely, unless it was a jet type or something of that sort. We haven't the facility for training a man to fly multi-engine stuff.

Chairman Miller: As I understood you, Mr. Bell, multi-engine experience is a prerequisite to becoming eligible, didn't you say that before?

Mr. Bell: Yes.

Chairman Miller: So that if Bryant was on your eligible list he must have shown multi-engine experience.

Mr. Bell: There is a certain elasticity to the requirements, to be sure, but it had been my understanding we required some multi-engine time. If there was an effort to pin me down as to the amount, I don't know. Flying aptitude is important, flying time comes next.

[fol. 410] Mr. McClearn: Well, Mr. Green, could a man fly a multi-engine aircraft if he had never done it before?

Mr. Green: Yes.

Mr. McClearn: Could he?

Mr. Green: Yes.

Mr. McClearn: Doesn't it require training to become a multi-engine pilot?

Mr. Green: To become proficient, definitely.

Mr. White: Mr. Chairman, I wonder if it would be possible, we are going to have to do quite a bit of deliberation on this thing, in my opinion, to find out who was qualified or not, and I think if you were to subpoena these records of these six people, that it would probably make the Commission's deliberations a little easier. I wonder if they could be made available to the Commission.

Chairman Miller: Would there be any objection to that, Mr. McClearn?

Mr. McClearn: Certainly if we have them I can see no objection to that.

Chairman Miller: Just for the purpose of looking at the records of those six?

Mr. White: To evaluate the six, yes, according to qualifications.

Chairman Miller: I presume they would be available.

Mr. McClearn: Yes. Mr. Bell did testify, I think, that [fol. 411] they have all been furloughed.

Chairman Miller: But you would still have the file showing the record?

Mr. McClearn: I expect we would.

Mr. White: On Mr. Green's record it showed his qualifications, on the exhibit.

Mr. McClearn: I wonder if the thing to do, I hate to have this thing dragged along, I wonder if we couldn't make those available to you simply as a supplementary exhibit.

Mr. White: That is my intention.

Chairman Miller: That's all right. If you would furnish us with the records on those six, showing their applications, their flying experience, and so forth. I think that is all Mr. White is asking.

Mr. McClearn: I would very much like to go ahead and conclude the formal part of the hearing.

Chairman Miller: That is the intention. I think that is all Mr. White had in mind.

Mr. White: I am trying to get home, remember?

Mr. McClearn: Let me notify you the first of the week.

Chairman Miller: That's all right. Is there anything further, Mr. Sayers?

Mr. Sayers: Nothing further.

Chairman Miller: All right, then, this concludes, with the [fol. 412] understanding you will furnish us—

Mr. Green: May I ask a question, sir?

Chairman Miller: Do you have a question?

Mr. Green: Yes.

Chairman Miller: Yes, I think you may ask a question.

Mr. Green: I wonder if this information which will be supplied subsequently by the Respondent will be available as a part of this public record, and particularly to myself.

Chairman Miller: It will be part of the file here, yes.

Mr. Green: Thank you.

Mr. McClearn: I just want to ask the Commission, if you are going to ask for or permit a closing statement.

Chairman Miller: If you like, yes. If you like, that's fine. I may say this, too, in connection with the closing, it is understood the Respondents are going to furnish the Commission with a memorandum of authorities on the question of jurisdiction within the ten-day period, then I assume that five days should be sufficient, Mr. Sayers. This is not going to be a complete brief for you to submit—

Mr. Sayers: Better make it ten because I will be out of town next week.

Chairman Miller: Ten days, then, to the complainant's attorney.

Mr. Chapman: Does that begin as of today?

[fol. 413] Chairman Miller: Yes.

Mr. McClearn: It is my understanding it is in the nature of a memorandum of authorities as distinguished from a brief.

Chairman Miller: And this relates solely to the issue of jurisdiction of the Commission.

All right, if you would like to make a closing statement, you may proceed, unless Mr. Sayers—

Mr. McClearn: I think Mr. Sayers would be first.

CLOSING STATEMENT IN BEHALF OF COMPLAINANT

Mr. Sayers: Mr. Chairman and Members of the Commission, I realize we are in a hurry to get away from here, it is raining, so forth and so on, so I will make this very short.

I just want to call attention to some things that I think have impressed me, perhaps, and I think you should take consideration of. First, in your deliberations I want you to remember the application. I can't quite give up the idea of them giving to Mr. Green one form of application as late as 1957 and still insisting that that application had not been used since 1954. I can't forget the idea that because the application was not complete, that Mr. Green was asked to write in the word "Negro". If it wasn't material,

if it wasn't used on the present form, it wasn't material, why ask him to write in the word "Negro"?

The second thing I want you to consider in your de-[fol. 414] liberations is the newspaper clipping, that came out, according to testimony, about August 4th. Had Mr. Green's application received consideration, Mr. Green would have been selected, it would have been before the newspaper clipping was published. Mr. Green would have had no reason to have had to put it in the paper, the article he did.

I think we should also note that Mr. Green was given the flight test, the link trainer test, but not interview. It seems like when they got that part done, then they were ready to send him on back East. That was overlooked. Some of the other applicants had had the interview and details given as to their qualifications. According to the testimony, as I see it, Mr. Green did not get that interview.

I think as members of the Commission that you should remember your duties under the law, that you have a right to issue a cease and desist order if you find that these people have discriminated against Mr. Green, that you may take any affirmative action necessary in connection with this matter, such as hiring and reinstatement of back pay, and so forth, all under subsection 12 of Section 6 of our Act.

I think that, briefly, are the things that I would like for you to consider in your deliberations.

Chairman Miller: Thank you, Mr. Sayers.

Mr. McClearn?

CLOSING STATEMENT IN BEHALF OF RESPONDENT

Mr. McClearn: Mr. Chairman, Members of the Commission: You will recall that in the complaint filed in this case there were essentially four allegations. I would like to discuss them briefly in reverse order.

The first allegation in the complaint was that Respondent's use of a photograph in connection with its application form constituted a discriminatory practice prohibited by the Colorado statute. The only testimony with reference

to that allegation is to the effect that Respondent has requested from its applicants at least throughout the 1940's and to date a photograph. The reasons for such request were explained to you in some detail. There was no suggestion by any of the parties, I think, that the reasons for using and requesting a photograph were to discriminate against a person by reason of race, color, religion, or any of the various acts prohibited by the statute. I think that in order to sustain that allegation of the complaint there has to be a finding, there must be a finding by you that this was done with intent to discriminate against the persons within the protection of the Act, and in view of the testimony that this practice was long continued by this Respondent and others generally in the business world, I submit that there is no evidence to support that allegation.

The second allegation had to do with the inclusion on the application form used prior to 1954 of applicant's race. We have admitted both here in the hearing and in our [fol. 416] Answer that before 1954 our application form contained a space for the applicant to indicate his race. The testimony is that that application form was changed on the 1st of January, 1954, and our exhibit, our current application form, shows that we have no such space. We also explained to you why we deleted the reference to race long prior to the passage of the present Anti-Discrimination Act. The reason for eliminating it was because it wasn't useful to us. We don't know and we have no need to know what types of ethnic groups or so-called minority groups are employed by us. I think there is no basis upon which this Commission can find that we intend to discriminate because the testimony is that we don't now, notwithstanding counsel for complainant's inference that we have two types of forms, one for colored people and one for white people, there simply is no evidence to sustain that inference and I don't see how any such finding could be made or should be made.

Thirdly, the complainant charged that the company failed to notify him within ten days as to whether he would be accepted in a certain class. We have presented testimony

to the effect that on the fifth of July a night letter was sent to Mr. Green at his El Dorado, Arkansas address, advising him that he hadn't been accepted for the ensuing class. Respondent received notice that the telegram had been undelivered on the 9th of July. The further evidence by way [fol. 417] of documents indicates that on the 8th of July Mr. Green called Mr. Bell and was immediately advised, confirming the telegram was sent to his then address. The El Dorado address, of course, came from his application form, as he testified.

Now, in the first place, there was no legal duty, I think, on the Respondent to notify any of its applicants within any period of time. I suppose they could have said, "We'll let you know within six months." The facts presented to the Commission indicate that it fairly and accurately discharged whatever obligation it had, and I submit that it was moral only. Certainly there is nothing with respect to that particular allegation upon which a finding of a discriminatory practice can be based.

That brings us, then, to the real crux of this hearing, and that is, whether the Respondent refused to employ Mr. Green on July 8, 1957, because he was a Negro. The evidence presented to you showed that it did not refuse to hire him on July 8, 1957. It advised Mr. Green that he had not been selected for the July class. The evidence was uncontradicted that his application was not rejected as was done with the majority of the people who applied to the Respondent for pilot positions but it was kept pending. That's the first point. In early August, of course, they did withdraw his application from the active file, but that again was not done because he happens to be a Negro. It [fol. 418] was done, as the testimony indicated, because he became involved in a situation which Continental did not desire its employees to be in. The fact that the situation had to do with this particular complainant's race is not germane to the fact of why it was withdrawn. The testimony is that if he had been involved, if he had been a white person and had been involved in a totally different type of controversy, the same result would have followed.

The facts, then, are that he was not refused hire on July 8 as alleged in the complaint. He was refused hire subsequent to early August, 1957, but for reasons which had nothing to do with his race.

Let me review only briefly the evidence on the central issue. The most cogent testimony in hearings of this type would be from the complainant himself. I have no doubt that Mr. Green throughout his life has been subjected to various forms of discrimination and he knows far better than I do or any of you do what discrimination is like. He testified at this hearing that during his interview at Continental Air Lines in June of 1957 he was treated courteously, kindly, and cordially by the persons with whom he came in contact. It is my recollection that he stated quite unequivocally that he was not discriminated against, to the best of his knowledge, while he was in Denver at Continental Air Lines. That's all the direct evidence that there [fol. 419] is on discrimination at that time and place against this complainant.

Turn, then, to the Continental evidence with respect to this situation. Our evidence indicated that there were numerous applicants, in fact, a continuous flow of applicants for pilot positions. Over approximately 175 were interviewed, interviewed at Denver in 1957. 35 were hired, approximately one in five. There were untold numbers who applied who were never asked to come to Denver for an interview. Of the specific class about which Mr. Green complains there were 14 interviewed, there were six who were qualified, there were eight who were rejected. Of the six who were qualified, four were selected and two were placed in a pending file. Of the two who were placed in a pending file, one was employed in September of 1957. The other, Mr. Green, was withdrawn from consideration in August for the reasons which I have already discussed.

At the conclusion of the complainant's testimony there was before this Commission no evidence of discrimination or anything upon which a finding adverse to this Respondent could be based. At that point there came about the situation which we discussed yesterday afternoon, and that

involved the introduction of testimony through Mr. Chapman and Mr. Binkley of conversations with the Respondent. My objection to that whole line of inquiry was overruled by the Commission, and this morning we presented [fol. 420] some evidence in further explanation of what transpired. It seems apparent that there were two areas of conversation, one of which had to do with Mr. Green, and Mr. Chapman and Mr. Binkley were told the situation which the evidence has outlined about the number of applicants, those who were qualified and those who were accepted. There then took place a following and more informal discussion in which Mr. Chapman asked the opinion of the Continental people what could be done about the airline industry problem concerning Negro pilots. A rather frank and honest evaluation of the situation occurred. Mr. Bell in response to questions of Mr. Chapman, and I think in an obvious endeavor to be helpful, discussed with him such problems as he felt could arise.

Now, you and I and everyone in this room would be less than a realist if we wouldn't admit that there would be problems in this area. It goes without saying, and if Mr. Bell had taken the position with Mr. Chapman, "Why, there wouldn't be any problem if a Negro was hired", he'd be less than honest with him.

Now, that testimony has represented the only phase of the complainant's case from which an inference of discrimination could be drawn, and that information was obtained when Mr. Chapman was pursuing his statutory duty, after a formal complaint had been filed, to consolidate and negotiate and discuss with Continental Air Lines the problem [fol. 421] which Mr. Green had raised by his complaint. I feel very strongly that a disservice has been performed by the admission of that testimony. I personally and I know each of you are in wholehearted accord with the purpose of this statute. It is a high-minded purpose, and certainly we believe in the principles behind it, and particularly in the principle which will resolve these racial problems without the necessity of litigation, but through the devices of conciliation and persuasion. If as a result of the use of

this type of frank discussion with Mr. Bell, resulting from the use of that discussion at this hearing, the conciliation phase of the statute is in effect nullified, and if as a result Continental and other employers become reluctant to discuss these problems frankly, the purposes of the statute will not have been served and neither will the people of Colorado.

In summation and to conclude, I submit to you that when a charge of this nature is brought against an employer, the burden of substantiating that charge is upon the person who brings it. I submit to you that upon all of the evidence that burden has not been carried.

I would submit in conclusion one somewhat rhetorical question to you. You have indicated by your inquiries that you feel—I don't mean to say it quite that way, but there is some question as to whether the fact that Mr. Green was not one of the four applicants indicates that he was intentionally discriminated against by Continental because he was a Negro. What your questions suggest to me is this: If you had six qualified applicants and four positions to be filled, Mr. Green because he is a Negro and because there are no other Negro pilots employed by you should have been one of the four. If that had been done, if Continental in its employment practices had been constantly conscious of the practice and effect of this law and they had said to themselves, "Look here, we are going to be accused of a violation of this statute if we don't hire Mr. Green, therefore take one of those white pilots off your list and put Mr. Green in", would they have been less guilty of a violation of this statute, or would the displaced white pilot have just reason to feel he had been discriminated against because he was white?

I will ask you now and during your deliberations to consider all of the evidence which has been brought before you, and I submit to you that no charge of discrimination has been made and sustained against this Respondent. Thank you very much.

Chairman Miller: Thank you, Mr. McClearn. I thank counsel for both sides for their able presentation of the

case, their careful consideration and their courtesies. The Commission will review the transcript of all the evidence and the arguments, and the legal questions as well, and also will expect, in accordance with our agreement, Mr. McClearn, the presentation of the file of the six applicants [fol. 423] so those can be studied at the same time as the transcript.

The matter will be taken under advisement. That concludes this hearing. Thank you all again.

(Whereupon, at 3:35 p. m. the proceedings in the foregoing matter were adjourned.)

[fol. 424] Reporter's Certificate to foregoing transcript (omitted in printing).

BEFORE THE COLORADO
ANTI-DISCRIMINATION COMMISSION

Volume 50, Page 90

COMPLAINANT'S EXHIBIT NO. 1

LEGEND: Insert N/A in the items below which are not applicable.

PERSONAL DATA	1. LAST NAME - FIRST NAME - MIDDLE NAME GREEN MARLON DEWITT		2. SERVICE NUMBER AO 222 1613		3. GRADE, RATE OR RANK Capt. (T)		4. DATE OF BIRTH (Day, Month, Year) 2 Apr 57	
	5. DEPARTMENT, COMPONENT AND BRANCH OR CLASS AIR FORCE AFRES		6. PLACE OF BIRTH (City and State or Country) El Dorado, Ark		7. DATE OF BIRTH 6 Jun 29		8. DATE OF BIRTH (Day, Month, Year)	
	9. RACE Negroid	10. SEX Male	11. COLOR HAIR Black	12. COLOR EYES Brown	13. HEIGHT 6-0	14. WEIGHT 190	15. U.S. CITIZEN <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	16. MARITAL STATUS Married
TRANSFER OR DISCHARGE DATA	17. TYPE OF TRANSFER OR DISCHARGE Discharge		18. STATION OR INSTALLATION AT WHICH EFFECTED Parke AFB, Calif		19. REASON AND AUTHORITY SDN 520 Resign Par 5b(3) AFR 36-12 as amended Hq USAF Mac AFMP-ABC 179959 dtd 21 Mar 57		20. EFFECTIVE DATE 8 May 57	
	21. LAST DUTY ASSIGNMENT AND MAJOR COMMAND 36th Air Rescue Sq (MATS)		22. CHARACTER OF SERVICE Honorable		23. TYPE OF CERTIFICATE ISSUED DD Form 256 AF		24. DATE INDUCED	
	25. SELECTIVE SERVICE NUMBER NA		26. SELECTIVE SERVICE LOCAL BOARD NUMBER, CITY, COUNTY AND STATE NA		27. DATE INDUCED NA		28. DISTRICT OR AREA COMMAND TO WHICH RESERVIST TRANSFERRED	
SELECTIVE SERVICE DATA	29. TERMINAL DATE OF RESERVE OBLIGATION NA		30. CURRENT ACTIVE SERVICE OTHER THAN BY INDUCTION <input type="checkbox"/> ENLISTED (First Enlistment) <input type="checkbox"/> ENLISTED (Prior Service) <input type="checkbox"/> REENLISTED <input checked="" type="checkbox"/> OTHER		31. TERM OF SERVICE (Years) Indef		32. DATE OF ENTRY 24 Mar 57	
	33. PRIOR REGULAR ENLISTMENTS N/A		34. GRADE, RATE OR RANK AT TIME OF ENTRY INTO CURRENT ACTIVE SERVICE 2/LT		35. PLACE OF ENTRY INTO CURRENT ACTIVE SERVICE (City and State) Reese AFB, Texas		36. STATEMENT OF SERVICE	
	37. NONE OF RECORD AT TIME OF ENTRY INTO ACTIVE SERVICE (Street, RFD, City, County and State) 724 S Smith Ave, El Dorado, Union, Ark		38. RELATED CIVILIAN OCCUPATION Airplane Plt 0-41.10		39. TOTAL ACTIVE SERVICE 9 3 4		40. FOREIGN AND/OR SEA SERVICE 1 3 27	
SERVICE DATA	41. SPECIALTY NUMBER AND TITLE 1034 Plt, Amph		42. DECORATIONS, MEDALS, BADGES, COMMENDATIONS, CITATIONS, CAMPAIGN RIBBONS, AWARDS OR ACHIEVEMENTS National Defense Service Medal		43. WOUNDS RECEIVED AS A RESULT OF ACTION WITH ENEMY FORCES (Place and date, if any) N/A		44. SERVICE SCHOOLS OR COLLEGES, COLLEGE TRAINING COURSES AND/OR POST-GRADUATION COURSES SUCCESSFULLY COMPLETED	
	45. SCHOOL OR COURSE Randolph Field, Texas Maxwell Field, Ala Palm Beach Int'l Arpt, Fla Randolph Field, Texas Palm Beach Int'l Arpt, Fla		46. DATES (From - To) Jun 51-Oct 51 Oct 52-Dec 52 Mar 53-May 53 Jan 54-Mar 54 Sep 55-Nov 55		47. MAJOR COURSES Combat Crew Train (B-29) USAF Sq Off Crse Heavy Trans Tng (C-97) 4 Engine Transition (B-29) Amphibian Transition (SA-16)		48. OTHER SERVICE TRAINING COURSES SUCCESSFULLY COMPLETED Armed Forces Inst Test Pass 2CX College Equip 1952	
	49. GOVERNMENT LIFE INSURANCE IN FORCE <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		50. AMOUNT OF ALLOTMENT NA		51. MONTH ALLOTMENT DISCONTINUED NA		52. VA BENEFITS PREVIOUSLY APPLIED FOR (Specify type) None	
VA DATA	53. REMARKS Item #3, 1/LT ResAF (AFRes) (P) 24 Mar 53, PSD 20 Apr 57, Blood Sp "B" Entitled to \$300.00 Mustering Out Pay. PL 550 82d Cong, 1st Instl Paid \$100.0. NACCompl 23 Sep 50, filed 4th Dist OSI, Add AFSC: 1231C-Pilot Bomb, 1221C-Pilot Lt Bomb.		54. PERMANENT ADDRESS FOR MAILING PURPOSES AFTER TRANSFER OR DISCHARGE (Street, RFD, City, County and State) See #23		55. SIGNATURE OF PERSON WHO TRANSFERRED OR DISCHARGED Marlon S. Green		56. SIGNATURE OF OFFICER AUTHORIZED TO SIGN J. E. OPELLA	
	57. TYPED NAME, GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR		58. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR		59. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR		60. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR	
	61. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR		62. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR		63. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR		64. GRADE AND TITLE OF AUTHORIZING OFFICER J. E. OPELLA CWO W-2 USAF ASST OIC RTN PROCESSING BR	

[fol. 425]
BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION
COMPLAINANT'S EXHIBIT NO. 1

FORM 214

REPLACES EDITION OF 1 JUL 52 WHICH IS
OBSOLETE AFTER 1 JULY 1956.

ARMED FORCES OF THE UNITED STATES
REPORT OF TRANSFER OR DISCHARGE

Volume 504 Page 90

6003444
FOR CONVENIENCE A CERTIFICATE OF SERVICE NO. _____ HAS BEEN
ISSUED BY THE VETERANS ADMINISTRATION TO BE USED FOR THE FUTURE REQUEST
OF ANY GUARANTY OR INSURANCE BENEFIT UNDER TITLE III OF SERVICEMEN'S
RE-ENLISTMENT ACT OF 1944, AS AMENDED. THAT MAY BE AVAILABLE TO THE
PERSON TO WHOM THIS SEPARATION PAPER WAS ISSUED. VARD, NEW YORK, N. Y.
VETERAN ELIGIBLE UNDER P.L. 550.

[fol. 427]

STATE OF MICHIGAN)
COUNTY OF INGHAM) ss..

I, C. Ross Hilliard, Clerk of the Circuit Court and of the County of Ingham, do hereby certify that the foregoing is a true and correct photocopy reproduction of ^{Separate} Honorable Discharge from the United States ... ^{Air Force} ... as appears of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Mason, Michigan this ..18th...day of ...September...A.D.1957.

C. ROSS HILLIARD, County Clerk

By *[Signature]*
Deputy County Clerk

HEADQUARTERS
AIR TRAINING COMMAND

PERSONNEL ORDERS)

NUMBER 20)

SCOTT AIR FORCE BASE
ILLINOIS
20 February 1951

1. Having completed the required course of instruction at the United States Air Force Advanced Multi-Engine Pilot School, Iness Air Force Base, Texas, each of the following named United States Air Force Officers (Class 51-B) is, under the provisions of paragraph 8a(1)(a), Air Force Regulation 50-7, 10 July 1946, as amended, and letter AFMFP-1-0, Headquarters United States Air Force, Washington, D.C., 3 March 1950, Subject: "Authority to Grant Aeronautical Ratings", rated PILOT effective 24 March 1951:

CAPTAIN

MANUEL FLORES, JR., A01553083

FIRST LIEUTENANT

LAWTON R. CASTLE, JR.,

A02101984 COURTLAND J. KISSER

A0590954

SECOND LIEUTENANT

JOHN J. ADDINGTON

JOHN J. BEALL, JR.

ALFRED R. BEZNE

J. T. BERTINGTON

NORMAN N. BLASKOSKI

WALTER G. BRAFFORD

WILLIAM L. BROWN

HARRY L. BUSH

JAMES BUTLER

CARL A. CARLSON

JAMES E. CURTIS

THEODORE D'AMICO

PETER J. DANIEL

JOHN E. DAVIS

CHARLES E. DUMPHY

STANLEY A. ELLIS

WILLIAM J. FERGUSON

ROBERT E. FLYNN

JOHN C. FREMONT

FRANK H. FULTON

DALE GIBBS

ALVIN B. GONZALEZ

BRUCE E. GRAHAM

MARLON D. GREEN

A0590509

A02221593

A02221594

A02221595

A02221596

A02221597

A02221598

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A0950919

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A02221610

A02221611

A0590911

A02221612

A02221613

ROBERT E. HALE

DAVID J. HAY

CHARLES F. HILL

GEORGE E. KRAUS

RUSSELL C. LARSON

JESSE P. LINDO, JR.

WILLIAM R. McIVER, III

PHILIP E. McCHESNEY

CHARLES W. MCCORMICK

WILLIAM I. MCCOWEN

JOHN C. MILLER

CURTIS F. MITCHELL

FRED L. OWENS, JR.

JAMES R. PARSONS

LOUIS M. PRESTWOOD, JR. A01856762

J. P. REAS, JR.

JOHN D. ROCHE

GEORGE R. SAVAGE

LEON J. SIEMS

CECIL B. SMITH

THOMAS W. SPENLIEG

DALLAS K. STEPHENS

Z. D. STRICKLAND

ROBERT F. SULLIVAN

A0590917

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A02221635

[fol. 429]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 3

INDIVIDUAL FLIGHT RECORD (PILOT)				1. MONTH AND YEAR March 1957		2. SER. NO.	
3. WING, GROUP, AND SQUADRON OR UNIT Air Rescue Service 90th Air Rescue Squadron, 5th Air Rescue Group				4. LAST NAME—FIRST NAME—MIDDLE NAME Green, Marion D.			
5. RATING AND DATE 1st Lt. 10 Apr 54		6. PRESENT RATING AND DATE 1st Lt. 10 Apr 54		10. <input type="checkbox"/> WHITE <input checked="" type="checkbox"/> GREEN <input type="checkbox"/> NO INST. CMT. DATE OF EXPIRATION 8 Jan 57		11. DATE OF BIRTH (day, month, year) 8 Jan 1929	
12. SERVICE NO. 10 2221813		13. GRADE AND COMPONENT 1st Lt. (AF Res)		14. SIGNATURE (Use ink and do placed copies) <i>Marion D. Green</i>			

LTC O. DAVENPORT, Major, USAF

SECTION I

CLASSIFICATION OF FIRST PILOT FLYING TIME																CLASSIFICATION OF COPILOT FLYING TIME					
AIRCRAFT TYPE MODEL SERIES	AUTH MISSION SYM	COMMAND AND/OR RADIO CONTROL PILOT TIME	NO LAND- INGS	AIRCRAFT COMMANDER TIME	INSTRUCTOR PILOT TIME	FIRST PILOT TIME	DAY		NIGHT		MOOD	COPILOT	DAY		NIGHT						
							WPR	WEATHER INSTRUMENT	WPR	WEATHER INSTRUMENT			WPR	WEATHER INSTRUMENT	WPR	WEATHER INSTRUMENT					
B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R					
NOT PREVIOUSLY RECORDED																					
SA-16A C-3			2			1:50	1:20				080	1:45	1:45								
SA-16A R-2			2			1:05			1:50	1:10					1:10						
SA-16A R-2			1			1:10			1:10			1:10				1:10					
SA-16A C-3			5			1:45	1:45					1:45	1:45								
SA-16A O-3			1			1:10	1:10														
SA-16A C-3			1			2:15		055	1:50	1:10		2:10	1:50	1:50	1:55	1:55					
SA-16A O-2			1			1:05	1:05					1:05	1:05								
SA-16A O-3			1			1:30	1:10	1:20				1:05	1:05			1:05					
CLOSED - PCS																					

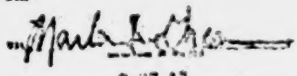
SECTION II - SUMMARY OF PILOT EXPERIENCE											
DUTY A	SINGLE ENGINE B	2 ENGINE C	MORE THAN 2 ENGINE D	2-ENGINE JET PROPULSION E	MULTI-JET PROPULSION F	JET ROCKET G	ROCKET H	ROTARY WING TYPE I	GLIDER J	OTHER K	TOTAL L
ADDITIONAL RADIO CONTROL PILOT											
INSTRUCTOR PILOT	87:00	100:00									187:00
INSTRUCTOR PILOT	72:35	100:00	200:10	2:00	1:25			1:25			485:30
INSTRUCTOR PILOT		400:05	500:15					4:25			770:45
COPILOT											
TOTAL USAF PILOT TIME	109:35	200:15	600:25	2:00	1:25			5:50			2785:20
REMARKS, PILOT CERTIFICATION AND SIGNATURE											
26. PILOT TIME: AF STUDENT											
27. CIVILIAN (Over 300 hp.)											
28. FOREIGN MILITARY											
29. OTHER U.S. MILITARY											
30. TOTAL											
PILOT COMBAT TIME											
31. AIRCRAFT COMMANDER											
32. COMMAND PILOT											
33. RADIO CONTROL PILOT											
34. INSTRUCTOR PILOT											
35. FIRST PILOT											
36. COPILOT											
37. OTHER											
38. TOTAL											

SECTION III—MISCELLANEOUS ENTRIES										DAY OF MONTH	Water Landing JP & P
DATE	TYPE	OCA	INSTRUMENT TRAINERS	FLIGHT SIMULATOR							
11-27	T	1									
11-28	T	1									
TOTALS THIS MONTH		2									
11-29	T	148	127:00	4:00							205
TOTALS TO DATE		150	127:00	4:00							200

[fol. 431]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 4

UNITED STATES OF AMERICA		DEPARTMENT OF COMMERCE		AIRCRAFT ADMINISTRATION	
THIS CERTIFIES THAT		MARION DENITT DILLER 734 SOUTH SMITH AVENUE EL PASO, TEXAS 79901			
DATE OF BIRTH	1-6-22	AGE	72	RACE	BLACK
SEX	F	EDUCATION	HS	RELIGION	ASA
SHE HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF					
A COMMERCIAL PILOT					
RATINGS AND LIMITATIONS					
AIRPLANE SINGLE ENGINE LAND					
AIRPLANE MULTI ENGINE LAND AND SEA					
INSTRUMENT					
					
DATE OF ISSUE 9-27-27					

CHANGE OF ADDRESS

Civil Air Regulations require that written notice of any change in permanent mailing address shall be furnished within 30 days to the Airman Records Branch, Civil Aeronautics Administration, Washington 25, D. C.

DURATION

This certificate is of such duration as is provided in the currently effective Civil Air Regulations, unless sooner suspended or revoked.

DUPLICATE CERTIFICATES

If this certificate is lost, destroyed, or mutilated, a duplicate may be obtained at the written request of the holder to the Airman Records Branch, Civil Aeronautics Administration, Washington 25, D. C. Such request must be accompanied by a check or money order in the sum of \$2.00, payable to the CAA, Department of Commerce. A duplicate will be issued only of a currently valid certificate.

[fol. 433]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 5

(Western Union Telegram Form)

1957 JUN 19 PM 5 32 (08) ..

NBG117 PD AR=FAX DENVER COLO VIA
ELDORADO ARK 19 NFT=MARLON D GREEN=
180 WEST 135 ST=ADVISE BY COLLECT WIRE AT EARLIEST CON-
VENIENCE IF STILL INTERESTED IN POSSIBLE
PILOT EMPLOYMENT IN NEAR FUTURE=KEN C SORBY EMPLOYMENT MGR
CONTINENTAL AIR LINES INC DENVER COLO=

[fol. 434]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 6

(Western Union Telegram Form)

(56) ..

NBG140 PD AR=FAX DENVER COLO 21 308PMM=

1957 JUN 21 PM 5 59

MARLON D GREEN=
181 WEST 135 ST=APPRECIATE YOUR COMING TO DENVER FOR IN-
TERVIEW AT EARLIEST CONVENIENCE TRANS
WORLD AIRLINES PASS NEWYORK/DENVER
ROUND TRIP WILL BE AVAILABLE FOR YOUR
PICK-UP AT AIRPORT TIKET COUNTER. SERVICE
CHARGE OF \$10 AND OTHER EXPENSES WILL BE
TO YOUR OWN ACCOUNT. ADVISE APPROXIMATE
DATE OF TRAVEL==KEN S CORBY CONTINENTAL AIR LINES INC
DENVER COLO=

176

[fol. 435]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 7

(Western Union Telegram Form)

(53).

DEA343 KA202

K DVB183 PD=FAX DENVER COLO 8 1147AMM=

1957 JUL 8 PM 2 06

MARLON D GREEN=

913 NIPP ST LANSING MICH=

PURSUANT OUR TELEPHONE CONVERSATION
FOLLOWING IS COPY OF WIRE SENT YOU LAST
FRIDAY AT YOUR PERMANENT ADDRESS 734
SOUTH SMITH AVENUE EL DORADO ARKANSAS
"REGRET YOU WERE NOT SELECTED FOR NEXT
COPILOT CLASS"=

H W BELL JR DIRECTOR OF PERSONNEL
CONTINENTAL AIR LINES INC=

[Handwritten notation—Note: Parents never received
telegram in Arkansas.—MDG.]

[fol. 436]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 8

December 27, 1957

Mr. Harrold W. Bell, Jr.
Director of Personnel
Continental Air Lines, Inc.
P. O. Box 9063
Denver, Colorado

Dear Mr. Bell:

This acknowledges your letter of December 23, 1957 concerning our scheduled conciliation meeting on the Marlon D. Green complaint.

I concur with your request that this meeting shall be completely informal and unrecorded. I sincerely hope that we can arrive at a satisfactory settlement of the complaint at this meeting.

The Commission has designated me to represent it at the January 7th meeting; therefore, none of the Commissioners will be present.

Very truly yours,

Roy M. Chapman, Coordinator

RMC/co

cc: Mark Kramer

[fol. 437]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 9

CONTINENTAL AIR LINES, INC.

General Policy Manual

PART 1—EMPLOYMENT

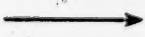
A. EMPLOYMENT POLICY

Applicants for employment will be considered solely on the basis of fitness and ability for the work as determined by such factors as character, skill, intelligence, and physical qualifications.

B. RESPONSIBILITY FOR PROCUREMENT

The recruitment of qualified applicants and their placement on suitable jobs are fundamental personnel activities. It is the responsibility of the Personnel Department to procure applicants for positions, screen them to determine their ability and fitness for the work required, and refer them to the head of the department or his designated representative for final selection. No employee is to be placed on the payroll unless this procedure has been followed.

NOTE: Employees are requested and encouraged to refer to the Employment Manager for interview individuals with whom they are acquainted and who may be interested in employment with Continental Air Lines. It is requested that employees based away from Denver communicate with the Employment Manager before referring an applicant to Denver to be certain that a representative of the Personnel Department will be available for interview. Upon authorization by the Personnel Department, on-line passes are provided applicants, who must be specifically advised that any expenses which they incur will be borne by them.



C. RESPONSIBILITY FOR SELECTION

The Department Head or his designated representative will select from the applicants referred to him by the Employment Manager the individual best suited for the position.

D. EMPLOYMENT TESTS

As a means of improving the selection process the Personnel Department will administer selected tests designed to measure the extent to which an applicant's abilities qualify him for the position for which he is applying. Such tests will include intelligence, aptitude, achievement, interest, and tests of personality. The Personnel Department will report the test results to the head of the department in which the opening exists together with its recommendation of the applicant's fitness for the position as an aid in accepting or rejecting the applicant.

E. EMPLOYMENT PROCEDURE

1. *Employment Authorization*—No employee will be hired, promised employment, or placed on the payroll unless the Personnel Department holds a properly authorized Employment Requisition.
2. *Employment Application*—All applicants for employment will complete an employment application and other supporting documents before they are accepted for employment and entered on the payroll.

(9/1/55) 11/1/56

Sec. IV Page 2

[fol. 438]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 10

October 4, 1957

Mr. Edward Kammerer
Box 187, RR #2
Rapid City, South Dakota

Dear Mr. Kammerer:

Marlon Dewitt Green, now residing at Lansing, Michigan, and whose paternal home is El Dorado, Arkansas, is endeavoring to obtain employment as a commercial airline pilot. He feels that he has been refused such employment because he is a Negro.

We are investigating him to determine whether or not he meets the requirements for such employment. Mr. Green has given us your name as a reference.

Will you please fill out applicable spaces on the attached Personality Record Form promptly and return it to us in the self-addressed, airmail envelope. Please write any additional remarks you care to make on the reverse side of the form.

Very truly yours,

Roy M. Chapman
Coordinator
RMC:sp
Enclosures

RECEIVED
OCT 11 1957

PERSONALITY RECORD OF APPLICANT
Suits 220 - 555 Broadway - Denver, Colorado

Marlon D. Green Address 913 Nipp St., Lansing, Mich.

Position Commercial Airline Pilot
Main ANTI-COMMUNISM DIVISION column

	Excellent	Good	Fair	Poor	Remarks
General Qualifications:					
Accuracy of Work	X				
Application	X				
Courtesy	X				
Industry		X			
Integrity	X				
Enthusiasm	X				
Leadership	X				
Self-Reliance		X			
Initiative	X				
Tactfulness	X				
Ability to Meet People	X				
Business Sense		X			
Personal Appearance	X				
Ability to Express Self Clearly	X				
Practical Ability in:					
1. XXXXXXXXXXXXXXXXXXXX					
2. XXXXXXXXXXXXXXXX					
3. XXXXXXXXXXXXXXXXXXXX					
4. XXXXXXXXXXXXXXXX					
5. XXXXXXXXXXXXXXXX					
6. XXXXXXXX					
7. XXXXXXXXXXXXXXXX					
8. XXXXXXXXXXXXXXXX					
9. XXXXXXXX					
10. Managing one's Finances		X			

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Would you recommend the applicant for the position applied for? *I would recommend him highly.*
 In that position, has the applicant been successful, to your knowledge? *I believe his service record speaks for itself as to professional qualifications.*
 In that position, has the applicant failed, to your knowledge? *Only to the extent of achieving what apparently is denied him because of race. See other side, please.*

Edward J. Kammerer
October 10 1957
Box 187 RR 2, Rapid City, South Dakota
Rancher

I was a student in a Southern "white" university when I first encountered Harlan Green several years ago. Our Department head, who happens to be a nationally-famous sociologist and scholar, had invited him to speak to upper division sociology classes on Air Force integration policies. My reaction to Mr. Green's performance in that somewhat sophisticated atmosphere was such that I sought his acquaintance and friendship. Since then, in the several roles in which I have known him, he has been nothing less than outstanding. Having observed him as a professional man, husband and father to an exemplary family, personal friend and companion in diverse social groups and situations, he has never given me any cause for my confidence in him. Particularly I have been impressed with his depth of understanding and compassion for human nature, his dedication to principle in all areas of his life, his quiet dignity, common sense and unassuming personality. In all of his social contacts while a friend and visitor in my home and community (not even prejudiced surroundings!) he has gained respect and admiration.

I anticipate, of course, that your Commission may receive many such replies as mine in the course of your work, and that such statements may carry little weight. I need cast no bouquets for Mr. Green, his qualifications stand on their own merit. I am, however, prepared and willing to furnish a dozen or more signed statements from others in my community who have made Mr. Green's acquaintance.

Edward Kammerer

[fol. 441]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

COMPLAINANT'S EXHIBIT No. 11

34

THE STATE JOURNAL
Lansing, Michigan

Sunday, Aug. 4, 1957

BLAMES RACIAL BIAS

JOB AS AIRLINE PILOT ELUDES LANSING NEGRO

By FRANK HAND
(Journal Staff Writer)

Marlon DeWitt Green of 913 Nipp st. wants to become a scheduled airline pilot.

If he does he will make history, because Green is a Negro.

The past three months have been 12 long weeks of frustration for the six-foot, 190-pound, 28-year-old former air force captain.

In the last three months he has traveled to California, to Denver, to Chicago, to New York, to Washington, D. C., in quest of work for which he has outstanding qualifications.

Green served nine years in the air force, seven of them as a pilot.

During those seven years his official flight record shows he has logged a total of 3,077 flying hours. Many of them were logged in the most difficult branch of the air force, the air-sea rescue service.

His record shows he has been checked out as a pilot for B-29, B-26, SA-16 (Albatross Amphibian), twin-engined Beechcraft, and as a co-pilot for V-97 (Stratocruiser). Besides, he has unlimited instrument and radio tickets.

Broken down, his record shows: 114 hours, single engine; 2,068 hours, twin engine; 606 hours, four engine; 225 hours, instrument; 184 hours, hood instrument; 127 hours, Link trainer time; 523 hours, night; and 130 hours multi-engine instrument time.

In addition, he has 226 hours of instructor time.

He saw service in the far east where most of his time was spent flying over water. Before his discharge he was assigned to the air-sea rescue service of the air force.

"Because the airlines promised they would hire pilots without discrimination," Green said, "I decided to quit the air force and become an airline pilot."

He was discharged from the air force last May 8.

Prior to his discharge Green said he wrote United Airlines and his application was received with enthusiasm until high officials learned of his race.

Green said he was given the routine company pilot's test which he passed. However, Green said, he was told, after a considerable delay, his psychological test showed "you cannot handle emergencies in the air."

This was a difficult thing for a former air-sea rescue pilot to swallow.

APPLICATION FILED

In Washington, D. C., he applied at Capital Airlines where, he said, officials told him they would keep his application on file until they received their new shipment of Vickers Viscounts.

So far, Green said, his greatest hope is with Trans-World airlines. He said he has been promised an interview with the president of the airline but no date has been set.

Green said he had great hopes of landing a job in Michigan where he learned there is a great demand for company pilots with his qualifications.

However, he has run into a brick wall here too, Green said.

One company official said bluntly, "I just don't know what to do with you," Green reported.

"There is no doubt in my mind that I have been turned down in every case because of my race," Green said.

Green has filed unfair labor practices complaints in the states of Washington and New York, and Washington, D. C. against United airlines.

(Photograph of Complainant)

MARLON D. GREEN

ENTERS COMPLAINTS

In Washington, D. C., he has filed complaints with the president's committee on government contracts against Capital Airlines and the air division of General Motors.

In Michigan he has filed complaints with the fair employment practices commission against General Motors, Francis Aviation and Abrams Aerial Survey corporation.

A spokesman for the Michigan FEPC said investigation has not yet begun on any of the three complaints filed here.

Green, a native of Arkansas, planned originally to settle in New York but could not get housing. He came to Lansing because a number of his relatives live here. Presently he is living off his savings.

Green is married and the father of five children.

[fol. 442]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

RESPONDENT'S EXHIBIT NO. 1

(Letterhead of Continental Air Lines, Denver 16, Colorado)

December 23, 1957

Mr. Roy M. Chapman, Coordinator
Colorado Anti-Discrimination Commission
655 Broadway Building, Suite 220
Denver 2, Colorado

Dear Mr. Chapman:

We have your letter of December 16, 1957, scheduling a conference in your office on January 7, 1958, with respect to the complaint filed by Marlon D. Green. As previously advised, we will be glad to discuss this matter with the Commission at that time.

There is, however, one point which we would like to have clarified prior to the meeting. We understand that the purpose of this meeting is to informally consider the positions of the parties in an effort to settle or compromise any differences by means of conference, conciliation and negotiation. For such a meeting to be of any value, the

persons present should engage in full and free discussion. In order that such a discussion may take place, we believe two things are necessary: First, that no stenographic or other recording of the discussion should be made; and second, it should be understood that nothing said by any of the persons present would be used in any way in any formal proceeding which may follow. In addition, certain notes were taken at our earlier meetings and it should be understood that those discussions took place in a conciliation effort and will not be used in any subsequent proceeding.

Since Mr. Green has filed a formal complaint with the Commission, it seems fairly clear that he has commenced legal action against Continental Air Lines, and it is for that reason we want to be sure we understand the purpose and effect of our meeting with the Commission. We do hope the proposed meeting can be held in the informal atmosphere suggested above, and that we can arrange for a satisfactory disposition of the matter. We intend to approach the meeting in that light and to use our best efforts to arrive at a solution acceptable to all concerned.

Will you please confirm our understanding that the meeting will be conducted as suggested above?

Yours very truly,

/s/ HARROLD W. BELL, JR.
Harrold W. Bell, Jr.
Director of Personnel

HWB:HC

cc: Mark Kramer



Continental Air Lines

APPLICATION FOR EMPLOYMENT

TO ALL APPLICANTS:

If you are completing this form in our Employment Office, please complete only the first page, then hand it to the receptionist. The receptionist will ask you to complete the application form, or will otherwise advise you. If you are completing this form at any other point, please answer all questions fully. A recent photograph, of sufficient size to show features clearly, is required on all completed applications.

Type of work applied for: _____

Name (Print or type): _____

(Last)

(First)

(Middle)

Soc. Sec. No. _____

Present Address: _____

(Street & No.)

(City)

(State)

Phone _____

Home Address: _____

(Street & No.)

(City)

(State)

Phone _____

In case of emergency notify: _____

(Name)

(Address)

(Religion)

(Phone)

Age: _____

Date of Birth: _____

Place of Birth: _____

Sex: _____

Height: _____

Weight: _____

Condition of Health: _____

State Physical Defects: _____

Time lost in last 5 years due to illness: _____

Selective Service Classification: _____

Citizenship: _____

Can you furnish a Birth Certificate? _____

No. of Dependents: _____

Marital Status (Check one): Single: _____

Married: _____

Widowed: _____

Separated: _____

Divorced: _____

Date of Marriage: _____

Do you own your home? _____

Rent? _____

Live with relatives? _____

Do you own an automobile? _____

Can you accept immediate employment? _____

If not, how soon? _____

Are you a member of the Communist party? _____

Will you accept night work? _____

Will you accept transfer out of state? _____

Locality preferred: _____

Have you ever been arrested? _____

If so, explain: _____

Has bond ever been refused or cancelled? _____

What salary do you expect? _____

What income do you have other than your salary? _____

Source: _____

How much do you owe? _____

For what? _____

Amount of life insurance carried: _____

Do you carry hospitalization insurance? _____

Circle last grade completed in school: 1 2 3 4 5 6 7 8 9 10 11 12

(College) 1 2 3 4 (Degrees)

In which quarter of your class did you rank? _____

What percentage of college expenses did you earn? _____

What is your typing speed? _____ (wpm)

Shorthand? _____ (wpm)

Office machines operated: _____

What languages do you speak? _____

State your hobbies: _____

Are you related to any officers, directors or employees of this company? _____

Names: _____

What types of positions have you held? _____

Who referred you to our company? _____

State briefly your qualifications for the work for which you are applying: _____

APPLICANT'S STATEMENT

I hereby agree, if accepted for employment, to cheerfully keep all rules and regulations, to perform all duties assigned to the best of my ability, and to be responsible for company property entrusted to my care. Furthermore, I agree to acquaint myself with company policy and abide thereby. I hereby authorize investigation of all statements contained in this record. I certify that such statements are true, and understand that misrepresentation or omission of facts called for is cause for separation from the company's services.

(Signed) _____

[Vol. 443]
BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

RESPONDENT'S EXHIBIT No. 2

EDUCATIONAL RECORD

TYPE	NAME	LOCATION	DATES	COURSES	GRADUATED
Elementary					
High					
Trade					
Business					
University					
Other					

If you did not graduate, why did you leave school?

Of what fraternal orders or clubs are you a member?

Check college activities in which you were successful: Athletics: Music: Dramatics: Class offices: Societies:

EMPLOYMENT RECORD

(Start with MOST RECENT employment. Explain lengthy periods of unemployment. Go back at least five years.)

DATES (Mo. & Yr.)		EMPLOYER	MAILING ADDRESS	MONTHLY EARNINGS	POSITION HELD	REASON FOR LEAVING
From:	To:					

MILITARY RECORD

Branch and dates of service: Type of discharge:

State full details of Reserve affiliation:

REFERENCES

(List three persons who have known you for five years or longer, to whom we may refer for information as to your character, habits, initiative, ability, etc. DO NOT REFER TO RELATIVES OR FORMER EMPLOYERS.)

NAME	MAILING ADDRESS	YEARS KNOWN	OCCUPATION

DO NOT WRITE BELOW THIS LINE

Employed as: Starting rate: Effective date:

Location: Department:

Acquisition: Date of physical exam:

Approvals: (Dept. Representative) (Employment Mgr.) (Personnel Director)

**APPLICANTS FOR PILOT, HOSTESS, MAINTENANCE OR COMMUNICATIONS WORK
MUST FILL IN APPROPRIATE SPACES ON THIS PAGE**

PILOTS

QUALIFICATIONS:

1. **EDUCATION:** High school, some college preferred
2. **AGE:** Not under 21 nor over 30 years
3. **HEIGHT:** Minimum 5'8"
4. **HEALTH:** Ability to pass Class I CAA physical exam
5. **VISION:** 20/20 without correction
6. **LICENSES:** CAA Commercial Pilot, CAA Instrument rating
7. **FLIGHT TIME:** Minimum 2000 hours
(Flight time must be substantiated by certified log or record)

Pilot Certificate No.: _____ Grade: _____ Instructor's rating: _____

Aircraft Equipment Ratings: (Land): _____ (Water): _____

Total Hours: _____ Night: _____ Cross Country: _____ Hours as: (First Pilot), _____ (Copilot) _____

List types of aircraft flown: _____

Soloed on: (Type of Aircraft): _____ At: (City): _____ Date: _____

Instrument Time: (Actual): _____ (Simulated): 1. Hood: _____ 2. Link: _____ Type rating: _____

What military pilot rating do you hold? _____ Nature and date of waivers: _____

What training have you had in: 1. Meteorology? _____ 2. Navigation? _____

3. Radio? _____ 4. Aircraft instruments? _____

Give date, place, type aircraft, circumstances and penalties on:

1. Accidents you have had resulting in injury or death of passengers: _____

2. Violations with which you have been charged: _____

State total hours flown and equipment used in last six months: _____

Date of last physical exam: _____ Class: _____ Waivers: _____

MECHANICS

Show amount of aircraft experience in each type of work for which qualified:

TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)
Aircraft Engine Maintenance		Airplane Overhaul		Line Service	
Aircraft Engine Overhaul		Instrument and/or Electrical		Special Training	
Airplane Maintenance		Sheet Metal		Other	

Do you hold valid C.A.A. licenses? "A" No: _____ "E" No: _____ "A & E" No: _____

List types of airplanes or engines familiar with and amount of experience on each: _____

101.4451

COMMUNICATIONS

F.C.C. radio operator license held: (No.): _____ (Class): _____ (Expires?): _____

How much total experience as radio-telephone operator? _____ Teletype operator? _____

If you are applying for radio maintenance work, give detailed account of specialized training and experience: _____

[fol. 447]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

RESPONDENT'S EXHIBIT No. 3

(Western Union Telefax Form)

YOUR NL 5TH MARLON D GREEN 734 SOUTH SMITH
 AVENUE ELDORADO ARK SGD JACK WEHLER
 CONTNL AIRLINES INC UNDELIVERED SAID TO
 HAVE GONE TO LANSING MICHIGAN 9113 NYPT
 STREET

SERVICE DEPT DVR 6TH

1240 P

[fol. 448]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

No. 25

[Title omitted]

STIPULATION AS TO TIME FOR FILING ANSWER TO RESPONDENT'S
 MEMORANDUM OF LAW—Filed May 24, 1958

Whereas, the above named and numbered complaint is now pending before The Colorado Anti-Discrimination Commission, and Respondent has filed "Respondent's Memorandum of Law Concerning Jurisdiction of the Commission", and

Whereas, the Commission has ordered that the Complainant be allowed ten (10) days in which to answer the same, which ten days expires May 29, 1958, and

Whereas, time for filing answer is now due and complainant has not yet completed the necessary preparation thereof, it is stipulated and agreed, by the parties hereto, that complainant be allowed an additional ten days in which to file answer to respondent's Memorandum of Law.

Duke W. Dunbar, Attorney General, By Wendell P. Sayers, Assistant Attorney General, Robert L. Nagel, Assistant Attorney General, Attorneys for Complainant, Room 4 State Capitol, Denver 2, Colorado.

Holland and Hart, By Patrick M. Westfeldt, William C. McClearn, Attorneys for Respondent, 520 Equitable Building, Denver 2, Colorado.

[fol. 449]

[File endorsement omitted]

[fol. 467]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

Supplementary Exhibits

(Letterhead of Holland & Hart, Denver 2, Colorado)

May 13, 1958

Mr. Edward Miller, Chairman
Colorado Anti-Discrimination Commission
University Building
Denver, Colorado

Re: Marlon D. Green v. Continental
Air Lines, Inc.

Dear Mr. Miller:

In accordance with the request of the Commission at the recent hearing in the above matter, there are enclosed the original Application for Employment forms received by Continental Air Lines from the ~~six pilot applicants~~.

The Commission was interested in the multi-engine flying experience of these applicants. Upon examination of the application forms, we noted that such information is not contained therein. Continental does not have a permanent record of the multi-engine experience of either its applicants or its pilot employees and the only place we know where this information can be obtained is from the personal flight log records of each applicant. Accordingly, we have asked Continental Air Lines to contact each of these applicants to obtain this information as of the date of the applicant's interview or employment by Continental. One of the applicants was never employed by Continental and at least one of them has since resigned to obtain employment elsewhere. Hence it may take several days to locate and

contact these persons. We will forward this information as soon as it is received. Since Mr. Green testified in some detail with respect to his flying experience, we do not believe it is necessary to contact him on this point.

Very truly yours,


~~HOLLAND & HART~~

By ~~/s/~~ WILLIAM C. McCLEARN
William C. McClearn

WCM/de
Enclosures
Registered Mail

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[fol. 468]

(See opposite) 

Continental Air Lines

APPLICATION FOR EMPLOYMENT

 (ATTACH
PHOTOGRAPH
HERE)

YOUR APPLICATION

If you are completing this form in our Employment Office, please complete only the first page, then hand it to the receptionist. The receptionist will ask you to complete the application form, or will otherwise advise you. If you are completing this form at any other point, please answer all questions fully. A recent photograph, of sufficient size to show features clearly, is required on all completed applications.

Type of work applied for: CO PILOT Date: 19 APRIL 57

Name (Print or type): COLE HOWARD FRANKLIN Soc. Sec. No. 449 44 2347

Present Address: 2007 JONES, WINTER FALLS (Street & No.) (City) (State) (Phone) TEXAS 398 71

Home Address: SAME (Street & No.) (City) (State) (Phone)

In case of emergency notify: OLIN H. COLE (Name) SAME (Address) FATHER (Relationship) (Phone)

Age: 25 Date of Birth: 1/23/32 Place of Birth: VERNON, TEX Sex: M Height: 5-9 Weight: 160

Condition of Health: EXCELLENT State Physical Defects: NONE

Time lost in last 5 years due to illness: 0 Selective Service Classification: VET

Citizenship: _____ Can you furnish a Birth Certificate? YES No. of Dependents: 1

Marital Status (Check one): Single: ☒ Married: _____ Widowed: _____ Separated: _____ Divorced: _____ Date of Marriage: _____

Do you own your home? NO Rent? _____ Live with relatives? YES Do you own an automobile? _____

Can you accept immediate employment? YES If not, how soon? _____ Are you a member of the Communist party? NO

Will you accept night work? YES Will you accept transfer out of state? YES Locality preferred: DENVER OR DALLAS

Have you ever been arrested? NO If so, explain: _____

Has bond ever been refused or cancelled? NO What salary do you expect? \$400-450 MONTH

What income do you have other than your salary? ACTIVE RESERVE Source: _____

How much do you owe? NOTHING For what? _____

Amount of life insurance carried: NONE Do you carry health or life insurance? NO

Circle last grade completed in school: 1 2 3 4 5 6 7 8 9 10 11 12 (College) 1 2 3 4 (Post-grad)

In which quarter of your class did you rank? 2nd What percentage of college expenses did you pay? Half

What is your typing speed? 30 (wpm) Shorthand? _____ (wpm) Office machines operated: _____

What languages do you speak? _____ State your hobbies: GOLF

Are you related to any officers, directors or employees of this company? NO Names: _____

What types of positions have you held? _____

Who referred you to our company? NO ONE State briefly your qualifications for the work for which you are applying: 4 YES, MILITARY FLYING EXPERIENCE, 1000 HOURS

APPLICANT'S STATEMENT

I hereby agree, if accepted for employment, to cheerfully accept all rules and regulations, to perform all duties assigned to the best of my ability, and to be responsible for company property entrusted to my care. Furthermore, I agree to acquiesce myself with company policy and abide thereby. I hereby authorize investigation of all statements contained in this record. I certify that such investigation is true, and understand that misrepresentation or omission of facts called for is cause for separation from the company. 50

(Signed)

Howard F. Cole

	LOCATION	DATES	COURSES	GRADUATED
High School	Wichita Falls, Tex.	1941 1944	STANDARD	YES
College	Wichita Falls Senior High	1946 1948		YES
University	Midwestern	1950 1953	Business Admin	No
Other				

If you did not graduate, why did you leave school? TO ENTER SERVICE

Of what fraternal orders or clubs are you a member?

Check college activities in which you were successful: Athletics: ☒ Music: ☐ Dramatics: ☐ Class offices: ☐ Societies: ☒

EMPLOYMENT RECORD

(Start with MOST RECENT employment. Explain lengthy periods of unemployment. Go back at least five years.)

DATES (Mo & Yr)		EMPLOYER	MAILING ADDRESS	MONTHLY EARNINGS	POSITION HELD	REMARKS
From:	To:					
SEPT 54	MAR 57	USMC		\$450	1st Lt	RETIRED
MAY 53	SEPT 54	USN		\$100	Naval Cadet	RETIRED
		STUDENT				

MILITARY RECORD

Branch and date of service: SEPT 54 - MAR 57 USMC MAY 53 - SEPT 54 USN USMC
Type of discharge: Honorable

State full details of Reserve affiliation: ACTIVE RESERVE

REFERENCES

(List three persons who have known you for five years or longer, to whom we may refer for information as to your character, habits, initiative, ability, etc. DO NOT REFER TO RELATIVES OR FORMER EMPLOYERS.)

NAME	MAILING ADDRESS	YEARS KNOWN	OCCUPATION
MR. W.D. GALT	979 CLOISTER RD, DALLAS	15	NATIONAL GUARDIAN
MR. J.L. EWING	2811 WENDON, WICHITA FALLS	10	ACCOUNTANT
MR. J.C. TATE	1307 TAYLOR, WICHITA FALLS	10	MINISTER

DO NOT WRITE BELOW THIS LINE

Employed on: _____ Starting rate: _____ Effective date: _____

Location: _____ Department: _____

Remarks: _____ Date of physical exam: _____

Approved by: _____ (Dept Representative) _____ (Employment Mgr) _____ (Personnel Director)

**APPLICANTS FOR PILOT, HOSTESS, MAINTENANCE OR COMMUNICATIONS WORK
MUST FILL IN APPROPRIATE SPACES ON THIS PAGE**

PILOTS**REQUIREMENTS:**

1. **EDUCATION:** High school and college preferred
2. **AGE:** Not under 21 nor over 30 years
3. **WEIGHT:** Minimum 150
4. **HEALTH:** Able to pass Class I CAA physical exam
5. **VISION:** 20/20 without correction
6. **LICENSES:** CAA Commercial Pilot, CAA Instrument Rating
7. **FLIGHT TIME:** Minimum 5000 hours
(5000 hour time must be substantiated by certified log or records)

Pilot Certificate No.: 1331116 Grade: COMMERCIAL Instructor's rating: _____

Aircraft Equipment Rating: SINGLE - MULTI ENG. (Water) _____

Total Hours: 1000 Night: 200 Cross Country: 100 Hours as: (First Pilot) 900 (Copilot) 100

List types of aircraft flown: FI-7, F9F-236, FV-2, F6F, SNB, SNJ

Issued on: (Type of aircraft) SNB (City) PENNSACOLA FLA Date: OCT 13, 1953

Instrument Time: (Solo) 150 (Simulator) 100 2. Link: 100 Type rating: STANDARD

What military pilot rating do you hold: STANDARD CAA Nature and date of waivers: NONE

What training have you had in: 1. Meteorology? US. NAVAL SCHOOL OF PRE-FLIGHT 2. Navigation? SAME

3. Radio? _____ 4. Aircraft instruments? _____

Give date, place, type aircraft, circumstances and penalties on:

1. Accidents you have had resulting in injury or death of passengers: NONE
2. Violations with which you have been charged: NONE

State total hours flown and equipment used in last six months: SNB - 100 HOURS - F9F-6 - 50 HOURS

Date of last physical exam: 14 APRIL 57 Class: MILITARY Waivers: 0

MECHANICS

Show amount of aircraft experience in each type of work for which qualified:

TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)
Aircraft Engine Maintenance		Airplane Overhaul		Line Service	
Aircraft Engine Overhaul		Instrument and/or Electrical		Special Training	
Airplane Maintenance		Sheet Metal		Other	

Do you hold valid C.A.A. licenses? "A" No. _____ "E" No. _____ "A & E" No. _____

Types of airplanes or engines familiar with and amount of experience on each: PRACTICALLY ALL MY EXPERIENCE IS IN SINGLE ENGINE EQUIP. MOSTLY JET.

fol 470

COMMUNICATIONS

Radio operator license held: (If any): _____ (Class): _____ (Expires?): _____

How much total experience as radio-telephone operator? _____ Teletype operator? _____

If you are applying for radio maintenance work, give detailed account of specialized training and experience: _____

DEPENDENTS

Are there any dependents (Check whether totally or partially dependent)

NAME	AGE	RELATIONSHIP TO YOU	STATUS

FAMILY HISTORY

Father's Name MARK T. STEARNS SR. Birthplace CANADA
 Mother's Name ANNE KATHLEEN STEARNS Birthplace CANADA
 No. of Sisters NONE No. of Brothers NONE If married, birthplace of husband or wife

EMPLOYMENT RECORD

Include all positions since leaving and during school in chronological order. Start with your present or most recent position. Be exact as to dates.

TIME EMPLOYED		EMPLOYER	ADDRESS	POSITION HELD OR TYPE OF DUTY	NO. EMPLOYED	REASON FOR LEAVING
From	To	Give Full Name of Company, Individual, Institution or Agency	City State			
Mo. Yr.	Mo. Yr.	SEPT 1953 SEPT 1957	VS-36 NAS NORFOLK VIRGINIA	PILOT	425	
Mo. Yr.	Mo. Yr.	SUMMERS OF 1950 1951 & 1952	NEW HAVEN RR BOSTON MASS	ASST. MECHANIC	280	
Mo. Yr.	Mo. Yr.		City State			
Mo. Yr.	Mo. Yr.		City State			
Mo. Yr.	Mo. Yr.		City State			
Mo. Yr.	Mo. Yr.		City State			
Mo. Yr.	Mo. Yr.		City State			
Mo. Yr.	Mo. Yr.		City State			
Mo. Yr.	Mo. Yr.		City State			

EDUCATION

Give below a complete record of schools attended:

SCHOOL	NAME OF SCHOOL	LOCATION	YEARS ATTENDED	DEGREE	REMARKS
Elementary	EDWARD E. HALE	EVERETT, MASS			
High	ENGLISH HIGH	BOSTON, MASS	1946 1950		
College					
University	NORTHEASTERN UNIV.	BOSTON, MASS	1950 1952	NO	
Nursing					
Other					

If you attended a university or college and failed to obtain your degree, state why ENLISTED IN NAVY AIR FORCE

In what quarter of your class did you graduate? Check the college records in which you were enrolled
 Of Publications None Dramatic etc None Hobby or Business None Other None

Of what Fraternities or Clubs are you a member?

What proportion of your college expenses, if any, did you earn? ALMOST ALL

What hobbies do you have?

What languages do you speak and write?

Form 1-54



Continental Air Lines

MR. WEILER
MR. CRAMP

APPLICATION FOR EMPLOYMENT

(ATTACH
PICTURE
HERE)

TO ALL APPLICANTS:

If you are completing this form in our Employment Office, please complete only the first page, then hand it to the receptionist. The receptionist will ask you to complete the application form, or will otherwise advise you. If you are completing this form at any other point, please answer all questions fully. A recent photograph, of sufficient size to show features clearly, is required on all complete applications.

Type of work applied for: CO-PILOT Date: 6-27-57

Name (Print or type): GEORGE, SYRIL CLARK Sex: M Soc. No. 572 26 1849

Present address: 5044 1/2 Colfax, Hollywood, Calif. Phone: PO 2-6725

Home address: 5044 1/2 Colfax, No. Hollywood, Calif. Phone: PO 2-6725

In case of emergency notify: Walter H. GEORGE, 5044 1/2 Colfax, No. Hollywood, Calif. 90028

Age: 29 Date of birth: 12-28-27 Place of birth: ST. LOUIS, MO. Sex: M Height: 5'10" Weight: 150

Condition of Health: Good Physical Defects: None

Time lost in last 5 years due to illness: None Executive Service Classification: SEA

Citizenship: U.S. Can you furnish a Birth Certificate? YES No. of Dependents: 3

Marital Status (Married, Single, Widowed, Divorced, Separated): Married Date of Marriage: 7-25-47

Do you own your home? No Do you own an automobile? YES

Can you accept immediate employment? YES How soon? Now Are you a member of the Communist party? NO

Will you accept night work? YES Will you accept transfer out of state? YES Locality preferred: DEVELOP

Have you ever been arrested? NO Explain: None

Has bond ever been refused or cancelled? NO What salary do you expect? None

What income do you have from other sources? None Source: None

How much do you owe? 1500.00 For what? AUTO-FURNITURE

Amount of life insurance carried: 10000.00 Do you carry hospitalization insurance? YES

Circle last grade completed in school: 1 2 3 4 5 6 7 8 9 10 11 12 (College) 1 2 3 4 (Postgrad) 12

In which quarter of your class did you rank? 1st What percentage of college expenses did you earn? 100%

What is your typing speed? 40 (wpm) Shorthand? None Office machines operated: None

What languages do you speak? English State your hobbies: WORKING, SWIMMING, TRAVEL

Are you related to any officers, directors or employees of this company? NO Names: None

What types of positions have you held? None

Who referred you to our company? None State briefly your qualifications for the work for which you are applying:

I HAVE BEEN FLYING WITH AIRLINES FOR THE LAST 14 YEARS. AM CURRENTLY IN THE TYPE OF EXPERIENCE USED BY AIRLINES. I HAVE THE NECESSARY LICENSES.

APPLICANT'S STATEMENT

I hereby agree, if accepted for employment, to cheerfully keep all rules and regulations, to perform all duties assigned to me to the best of my ability, and to be responsible for company property entrusted to my care. Furthermore, I agree to acquiesce in any investigation of my life and activities, and to be responsible for company investigation of all statements contained in this record. I certify that such statements are true, and understand that misrepresentation or omission of facts called for is cause for separation from the company's service.

George Syril Clark

EDUCATIONAL RECORD

TYPE	NAME	LOCATION	DATES	COURSES	GRADUATED
University	MUSCATEL GRADUATE	ROSEMONT, CALIF	1941	GENERAL	YES
High School	EL MONTE HIGH	EL MONTE, CALIF	1941	METEOROLOGY	YES
Business			1945	BUSINESS	YES
College					
Technical					
Other					

If you did not graduate, why did you leave school?

Are you a member of any fraternal order or club? NONE

What college and high school did you attend? Music: _____ Sports: _____ Other activities: _____

EMPLOYMENT RECORD

(Start with MOST RECENT employment. Explain lengthy periods of unemployment. Go back at least five years.)

DATE	FROM	TO	EMPLOYER	MAILING ADDRESS	MONTHLY EARNINGS	POSITION HELD	REASON FOR LEAVING
5-14-52	7-1-52		SLICK AIRWAYS	3000 CHILDRAN, BURBANK, CALIF	500.00	CO-PILOT	FURLONG
1-54	5-14-52		DOUGLAS OVERSEAS	2539 PARKWAY DR. EL MONTE, CALIF	475.00	CARPENTER	AIRLINES
12-51	1-54		(SELF EMPLOYED)			OWNER	FAMILY
12-50	12-51		GEORGE FLYING SERV.	1044 1/4 COLINA, NO. HAVEN, CALIF	400.00	OPERATOR	RELATIONS
			BOEING AIRCRAFT	SEATTLE, WASH.		A/E MECHANIC	WENT INTO BUSINESS

MILITARY RECORD

Branch and dates of service: U.S. NAVY - 3-23-45 - 7-10-46 Type of discharge: HONORABLE

State full details of Reserve affiliation: NONE

REFERENCES

(List three persons who have known you for five years or longer, to whom we may refer for information as to your character, habits, habits, ability, etc. DO NOT REFER TO RELATIVES OR FORMER EMPLOYERS.)

NAME	MAILING ADDRESS	YEARS KNOWN	OCCUPATION
BOB NIMCHESKI	1965 VALENTIA, DENVER	7 years	CO-PILOT
WALT ZAUSSKA	595 VENTURA - ALTAMIRA, CALIF	5 years	FLIGHT ENGINEER
DR. CRICKSON	1444 PROVIDENCIA, BURBANK, CALIF	5 years	CO-PILOT

DO NOT WRITE BELOW THIS LINE

Employed as: _____ Starting rate: _____ Effective date: _____

Department: _____

Date of physical exam: _____

Approved: _____ (Dept. Representative) _____ (Employment Mgr.) _____ (Personnel Director)

APPLICANTS FOR PILOT, HOSTESS, MAINTENANCE OR COMMUNICATIONS WORK
MUST FILL IN APPROPRIATE SPACES ON THIS PAGE

PILOTS

EDUCATION

1. EDUCATION: High school, some college preferred
2. AGE: Not under 21 nor over 50 years
3. HEIGHT: Minimum 5'3"
4. EYES: Ability to pass Class I CAA physical exam
5. VISION: 20/20 without correction
6. RECORDS: CAA Commercial Pilot, CAA Instrument rating
7. FLIGHT TIME: Minimum 2000 hours
(Flight time must be substantiated by certified log or record)

Log Books
in Calif.

Pilot Certificate No. 694251 Grade: 17 Instructor's rating: -

Aircraft Equipment (Land): SEI-MEL-INSTRUMENT (Water): -

Total Hours: 2100.53 Instrument: 1182.52 Cross Country: 1174.13 Hours as: (First Pilot): 1145.35 (Copilot): 87.18

List types of aircraft flown: DC-6A - DC-4 - C-46 - TWIN APACHE - VARIOUS LIGHT BIRDS

Soloed on: (Type of Aircraft): SEI-MEL At: (City): CLARK, CALIF. Date: 1946

Instrument Time: (Actual): 3412.0 (Simulated): 1. Hood: 37.65 2. Link: 26.40 Type rating: -CAN

What military pilot rating do you hold? - Nature and date of waivers: NONE

What training have you had in: 1. Meteorology? NONE 2. Navigation? SLICK AIRWAYS - (PRIVATE)

3. Radio? SLICK AIRWAYS - (PRIVATE) 4. Aircraft instruments? SLICK AIRWAYS

Give date, place, type aircraft, and conditions and penalties on:

1. Accidents you have had resulting in injury or death of passengers: NONE

2. Violations with which you have been charged: NONE

State total hours flown, and equipment used in last six months: 510.53 - DC-4A - DC-4 - C-46

Date of last physical exam: DEC - 5 - 1956 Class: 17 Waiver: NONE

MAINTENANCE

Show amount of aircraft experience in each type of work for which qualified:

TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)
Aircraft Engine Maintenance		Aircraft Overhaul		Eng. Service	
Aircraft Engine Overhaul		Instrument and/or Mechanical		Ground School	
Aircraft Maintenance		Sheet Metal		Other	

Do you hold valid C.A.A. License? A: No B: No "A & B" No

List types of airplanes or engines familiar with and amount of experience on each:

Location: _____

Department: _____

fol 4751

COMMUNICATIONS

Radio operator license held: (No.): 11F2563 (Class): 3rd CLASS (Rating): PERMANENT

How much total experience as radio-telephone operator? _____ Teletype operator? _____

If you are applying for radio maintenance work, give detailed account of specialized training and experience: _____

Continental Air Lines, Inc.

APPLICATION FOR EMPLOYMENT

The information furnished on this blank will be treated strictly confidential. It will be to the applicant's advantage to answer each question fully and accurately. The use of this blank does not indicate there are any obligations to the company. This application is submitted, with the understanding that the company will be free to use the information for any purpose and that a physical examination satisfactory to the company must be passed before employment can be secured.

I agree that all information given by me in this application is correct to the best of my knowledge and belief and that any statement made herein or any concealment of facts shall be considered and treated as a breach of contract and cause for discharge from the service of this company. I agree that my employment by this company is for no definite period of time. How is my application approved or rejected by the Personnel Office.

Signature of applicant

Mark T. Stearns

PERSONAL HISTORY

Date 28 May 1957

Type of Work or Position Desired PILOT

Print or Type Name

STEARNS

MARK

THORNTON

CAJ

Present Address

AIR AND SUBMARINE SQUADRON THIRTY SIX & FLEET P. O. BOX 11

Home Address

122 GILBERT ROAD WEST ROXBURY 12 MASSACHUSETTS

In case of emergency notify:

MARK T. STEARNES SR. FATHER 122 GILBERT RD. WEST ROXBURY MASS.

Age

26

Date of Birth

DEC 6 1929

Place of Birth

BOSTON MASS

Raised at

BOSTON MASS

Social Security No

023-22-1527

Salary Expected \$

Local by Postcard

Percent

AMERICAN

U. S. Citizen

YES

Native or Naturalized

NATIVE

Will you accept temporary work?

YES

Will you accept all work?

YES

If employed can you furnish a birth certificate or other proof of citizenship immediately?

YES

What is your selective service classification?

Has bond ever been returned to you or cancelled?

NO

Own your home

NO

Buy Home

NO

Rent

NO

Board

YES

Live with parents

NO

Single

YES

Married

NO

Date of marriage

Widowed

NO

Separated

NO

Divorced

NO

What is the present condition of your health?

EXCELLENT

What physical condition do you have?

NONE

Height

5' 5"

Weight

140

Color of eyes

BLUE

Color of hair

BROWN

Occupation

PILOT

Class

NO

Rank

Of what military organization, if any, are you a member?

UNITED STATES NAVY

Have you any objection to being transferred to another state in the course of your employment?

NO

Are you a member of the Communist Party?

NO

Are you a member of the Communist Party?

NO

FINANCIAL

Amount of life insurance carried \$

10,000

Do you carry health and accident insurance?

NO

Do you have other than your salary?

NONE

Have you any debts or financial obligations (inc. alimony)?

NO

If "Yes" explain fully

What is your present plan of paying present obligations?

per month \$

58

REFERENCES

Give names and addresses of four persons you have known for five years or longer, and to whom you can refer to as to your character, habits and ability. Do not refer to any relative or an employee of this company:

NAME	ADDRESS		OCCUPATION
	Street and Number	City and State	
DR. HENRY W. BUEHNER	POST OFFICE BOX 235	MONTEREY, CALIF.	USE PROFESSOR
DR. ALBERT TROMBET	481 ELIOT ST.	MILTON, MASS.	OPTOMETRIST
MR. WALTER CLARK	122 Channing st.	STOUGHTON, MASS.	SALESMAN
MR. JOSEPH ROSENBERG	122 GREATON ROAD	WEST ROXBURY, MASS.	REAL ESTATE AGENT FOR STATE OF MASS.

RELATIVES IN COMPANY

Are you related to any officers, directors or employees of this company? Yes or No If so list below:

NAME	POSITION	RELATIONSHIP

IF YOU ARE QUALIFIED FOR ANY OF THE FOLLOWING POSITIONS, PLEASE ANSWER ANY OR ALL OF THE QUESTIONS

PILOT

(THE FOLLOWING FLYING TIMES MUST BE SUBSTANTIATED BY CERTIFIED LOG OR RECORD)

Pilot 13/1968 Grade COMMERCIAL Aircraft Equipment MULTI-ENG Water Water
 Ratings: Land Land
 Licenses or Ratings: Licenses or Ratings
 Hours as: Hours as
 (1) First Pilot 275 (2) Co-Pilot 450
 Types of Airplane Flown: SNJ, TUN, SNB BECHCRAFT, T28 TRAINER, GRUMMAN S2F
 Date of 17 MARCH 1954 SNJ Airplane at (City) PENSACOLA FLA Date 1954
 Military airplane pilot rating do you hold? STANDARD WHITE CARD Nature and Date of license waivers Nature and Date of license waivers
 (1) Meteorology? (1) Meteorology? (2) Navigation? (2) Navigation?
 (3) Aircraft Instruments? (3) Aircraft Instruments?
 (4) Airplane, date, type airplane, circumstances and penalties (4) Airplane, date, type airplane, circumstances and penalties
 (5) Accidents you have had resulting in injury or death of passengers: None
 (6) Accidents you have had resulting in injury or death of passengers: None

RADIO

Telephone License Class RESTRICTED Date of 1/1/19 Original License Class No. Words 100 per hour
 Radio License Class No Date 1/1/19 Other None License Held None Receiver on Typewriter None

any other training or knowledge in radio

MECHANICAL

License No. 1 Expiration Date 1/1/19 State Amount of Aeronautical Experience (in years) None Line Maintenance None Own Complete Set of Tools None

Other mechanical experience

OFFICE

State amount of experience in following: Filing None Dictation None Machines None

Typing Speed? None Typing Speed? None Other Business None

State amount of experience in months or years in the following

Accountant		Computer Operator		Anti-Aircraft Clerk	
Auditor		IRM Operator		Stock Clerk	
Billing Clerk		Pay Roll Clerk		Other	
Bookkeeper		Shipping Clerk			

REMARKS:

INSTRUCTIONS TO EMPLOYING OFFICE

Employing office or his clerk must see that applicant fills out one copy of form P-134 for each reference checked by interviewer. These are to be attached to this application and properly forwarded to Personnel Department, Denver, after applicant has been qualified by medical examination and the portion below has been filled out.

Employed on 1/1/19 Effective Date 1/1/19

Location Denver Department Personnel

(EMPLOYING OFFICE MUST SIGN THIS AFFIRMATION)

I have personally reviewed this application and recommended employment if investigation of references proves satisfactory.

(Personal Signature of Employing Office) None (Date) 1/1/19

Continental Air Lines

APPLICATION FOR EMPLOYMENT

If you are applying for employment with Continental Air Lines, please complete only the following form. Do not fill in the space for the photograph. The photograph will be taken by the company. If you are applying for employment, you must also submit a recent photograph of sufficient size to show features clearly. It is required on all completed applications.

Type of work applied for: Accepted Date: June 31, 1957

Name (Print or type): Charles Elmer II For. Sec. No. 603 12 0103

Present Address: 1914 N. Willow St., Anaheim, Calif. Phone: Kayetone 38517

Home Address: SPRING ST. ANAHEIM Phone: 707 7087

Place of birth: 1914 N. Willow St., Anaheim, Calif. Wife: 32307

Place of residence: 1914 N. Willow St., Anaheim, Calif. Sex: M Height: 6 ft. Weight: 160 lb.

Condition of health: Excellent State Physical Defects: None

Time lost in last 5 years due to illness: None Selective Service Classification: 5-A

Citizenship: U.S. Can you furnish a Birth Certificate? Yes No. of Dependents: three

Marital Status (Check one): Single: Married: X Widowed: Separated: Divorced: Date of Marriage: 5/13/57

Do you own your home? X Rent? Live with relatives? Do you own an automobile? Yes

Can you accept immediate employment? No If not, how soon? One week Are you a member of the Communist Party? No

Will you accept night work? Yes Will you accept transfer out of state? Yes Locality preferred: None

Have you ever been arrested? No If so, explain:

Has bond ever been refused or canceled? No What salary do you expect? Upon

What income do you have other than your salary? None Source:

How much do you owe? 100.00 For what? automobile

Amount of life insurance owned: 8000.00 Do you carry life insurance? Yes

Circle last grade completed in school: 1 2 3 4 5 6 7 8 9 10 11 12 (College) 1 2 3 4 (Degree)

In which quarter of your class did you rank? First What percentage of college expenses did you pay? 100%

What is your typing speed? (wpm) Shorthand? (wpm) Office machines operated: None

What languages do you speak? None State your hobbies: Flying, swimming

Are you related to any officers, directors or employees of this company? No Names:

What types of positions have you held? fabrication control dispatcher, inspector

Who referred you to our company? W. M. Hilox State briefly your qualifications for the position and why you are applying: I have a commercial pilot license with instrument and flight instructor ratings and 1231:00 hrs. flying time

EMPLOYEE'S STATEMENT

I hereby agree, if accepted for employment, to cheerfully keep all rules and regulations, to perform all duties assigned to me by my company, and to be responsible for company property entrusted to my care. Furthermore, I agree to sign and comply with company policy and rules. I hereby authorize investigation of all statements contained in this report. I certify that such statements are true and understand that misrepresentation or omission of facts called for is cause for separation from the company's service.

(Signed) Charles E. Elmer II

EDUCATIONAL RECORD

TYPE	NAME	LOCATION	DATES	COURSES	GRADUATED?
Elementary	Saint Matthias	Huntington Park, Cal.	1936		
High	Huntington Park, HS	Huntington Park, Cal.	1944		yes
	Verdugo Hills, HS	Tujunga, Cal.	1948	comm. course	yes
Trade	Fullerton Air Service	Fullerton, Cal.	1954	comm. pilot	
			1957	inst. flt. inst	yes
Business					
University	Cameron Jr. College	Lawton, Okla.	1953	accounting	no
	Fullerton Jr. Col.	Fullerton, Cal.	1956	math, physics	no
Other					

If you did not graduate, why did you leave school? still plan to complete 2 yrs. of college

Of what fraternal orders or clubs are you a member? none

Check college activities in which you were successful: Athletics: _____ Music: _____ Dramatics: _____ Class offices: _____ Societies: _____

EMPLOYMENT RECORD

(Start with MOST RECENT employment. Explain lengthy periods of unemployment. Go back at least five years.)

DATE (Mo & Yr.)		EMPLOYER	MAILING ADDRESS	MONTHLY EARNINGS	POSITION HELD	REASON FOR LEAVING
From:	To:					
2/58	-	Northrop Aircraft Inc.	500 E. Orangethorpe Anaheim, Calif.	\$390.00	project dispatcher	still employed
8/51	2/56	Harvey Machine Company, Inc.	19200 S. Western Torrance, Calif.	\$350.00	prod. control	improve position
2/50	8/51	Grayson Heat Controls	Imperial Hwy. Lynwood, Calif.	\$300.00	inspector	improve position

MILITARY RECORD

Branch and dates of service: U.S. Navy and U.S. Army Type of discharge: honorable

State full details of Reserve affiliation: None

REFERENCES

(List three persons who have known you for five years or longer, to whom we may refer for information as to your character, habits, initiative, ability, etc. DO NOT REFER TO RELATIVES OR FORMER EMPLOYERS.)

NAME	MAILING ADDRESS	YEARS KNOWN	OCCUPATION
Gale M. Cubarly	1640 E. Elm St. Anaheim, Calif.	7 yrs.	I.B.M. engineer
Thomas Goodwin	1916 E. Willow St. Anaheim, Calif.	5 yrs.	city engineer
Ronald W. Donaghy	642 W. Baker St. Fullerton, Calif.	15 yrs.	Northrop dispatcher

DO NOT WRITE BELOW THIS LINE

Approved by: _____ Starting rate: ✓ Effective date: _____

Department: _____

Date of physical exam: 63

Signature: _____ (Dept. Representative) - 5 (Employment Mgr) (Personnel Director)

**APPLICANTS FOR PILOT, HOSTESS, MAINTENANCE OR COMMUNICATIONS WORK
MUST FILL IN APPROPRIATE SPACES ON THIS PAGE**

QUALIFICATIONS:

1. **EDUCATION:** High school, some college preferred
2. **AGE:** Not under 21 nor over 30 years
3. **WEIGHT:** Minimum 5'8"
4. **HEALTH:** Ability to pass Class I CAA physical exam
5. **VISION:** 20/20 without correction
6. **LICENSES:** CAA Commercial Pilot, CAA Instrument rating
7. **FLIGHT TIME:** Minimum 2000 hours
(Flight time must be substantiated by certified log or record)

PILOTS

Pilot Certificate No: 1303052 Grade: commercial Instructor's rating: 1303052

Aircraft Equipment Ratings: (Land): airplane single engine (Water): ---

Total Hours: 1031:00 Night: 37:00 Cross Country: 103:00 Hours as: (First Pilot): 916:00 (Copilot): ---

List types of aircraft flown: 0-450 h.p. single engine, T-50 twin cessna

Enrolled on: (Type of Aircraft): inscombe B-A At: (City): Fullerton Date: Sept. 21, 1964

Instrument Time: (Actual): 00 (Simulated): 1. Hood: 60:00 2. Link: 4:00 Type rating: C.A.A.

What military pilot rating do you hold? none Nature and date of waiver: none

What training have you had in: 1. Meteorology? 55 hrs ground school 2. Navigation? 60 hrs ground school, 64 hrs flight

3. Radio? 40 hrs ground school I.L.S. and A. Aircraft instruments? 30 hrs ground school

Give date, place, type aircraft, circumstances and penalties on:

1. Accidents you have had resulting in injury or death of passengers: none

2. Violations with which you have been charged: none

State total hours flown and equipment used in last six months: 300 hrs, single engine to 165 h.p.

Date of last physical exam: June 3, 1967 Class: two Waiver: none

MECHANICS

Show amount of aircraft experience in each type of work for which qualified:

TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)
Aircraft Engine Maintenance		Airplane Overhaul		Line Service	
Aircraft Engine Overhaul		Instrument and/or Electrical		Special Training	
Airplane Maintenance &		Sheet Metal		Other	

Do you hold valid CAA licenses? "A" No. _____ "E" No. _____ "A & E" No. _____

Types of airplanes or engines familiar with and amount of experience on each: _____

COMMUNICATIONS

Radio operator license held: (No.): _____ (Class): _____ (Expires?): _____

How much total experience as radio-telephone operator? _____ Teletype operator? _____

If you are applying for radio maintenance work, give detailed account of specialized training and experience: _____

Continental Air Lines

APPLICATION FOR EMPLOYMENT

ATTACH
PHOTOGRAPH
HERE

ALL APPLICANTS:

If you are completing this form in our Employment Office, please complete only the first page, then hand it to the receptionist. The receptionist will ask you to complete the application form, or will otherwise advise you. If you are completing this form at any other point, please answer all questions fully. A recent photograph, of sufficient size to show features clearly, is required on all completed applications.

Type of work applied for: Co-Pilot Date: April 1, 1957

Name (Print or type): Bryant, James Baird Soc. Sec. No. 463 52 8170

(Last) (First) (Middle)

Present Address: Lincoln Hts. Apt. #1 Odessa Texas Phone: FE2-2142

(Street & No.) (City) (State)

Home Address: 2112-26th St. Lubbock Texas Phone: PC3-0956

(Street & No.) (City) (State)

In case of emergency notify: Mrs. James B. Bryant, Lincoln Hts. #1 Wife FE2-2142

(Name) (Address) (Relationship) (Phone)

Age: 21 Date of Birth: 12-18-35 Place of Birth: Dallas, Texas Sex: M Height: 68 1/2" Weight: 160

Condition of Health: Excellent State Physical Defects: None

Time lost in last 5 years due to illness: None Selective Service Classification: I-R

Citizenship: U.S.A. Can you furnish a Birth Certificate? yes No. of Dependents: 1

Marital Status (Check one): Single: ☐ Married: ☒ Widowed: ☐ Separated: ☐ Divorced: ☐ Date of Marriage: 11-24-54

Do you own your home? No Rent? yes Live with relatives? No Do you own an automobile? yes

Can you accept immediate employment? yes If not, how soon? (Two Weeks) Are you a member of the Communist party? No

Will you accept night work? yes Will you accept transfer out of state? yes Locality preferred: Dallas

Have you ever been arrested? No If so, explain: _____

Has bond ever been refused or cancelled? No What salary do you expect? \$400 per month

What income do you have other than your salary? None Source: _____

How much do you owe? \$2,000 For what? 1957 Chevrolet

Amount of life insurance carried: 2,120 dollars Do you carry hospitalization insurance? yes

Circle last grade completed in school: 1 2 3 4 5 6 7 8 9 10 11 12 (College) ☒ 2 3 4 (Degrees) High School

In which quarter of your class did you rank? First What percentage of college expenses did you earn? 25-75

What is your typing speed? 70 (wpm) Shorthand? _____ (wpm) Office machines operated: Adding machine

What languages do you speak? English State your hobbies: Sports, Cars

Are you related to any officers, directors or employees of this company? No Names: _____

What types of positions have you held? Instructor

Who referred you to our company? Jack Little (AME) State briefly your qualifications for the work for which you are applying:

My CFA License and my flying experience are my qualifications.

APPLICANT'S STATEMENT

I agree, if accepted for employment, to cheerfully keep all rules and regulations, to perform all duties assigned to the best of my ability, and to be responsible for company property entrusted to my care. Furthermore, I agree to acquaint myself with company policy and abide thereby. I hereby authorize investigation of all statements contained in this record. I certify that such statements are true, and understand that misrepresentation or omission of facts called for is cause for separation from the company's service.

(Signed)

James B. Bryant

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[fol. 484]

EDUCATIONAL RECORD

TYPE	NAME	LOCATION	DATES	COURSES	GRADUATE
Elementary	Cockrell H. H.	Dallas, Texas	1942-1950	Academic	YES
High	Lubbock Senior High	Lubbock, Texas	1950-1954	Academic	yes
College					
University	Texas Technological College	Lubbock, Texas	1954-1955	Engineering	NO
Other					

If you did not graduate, why did you leave school? To study aviation at a private school

Of what fraternal orders or clubs are you a member?

What college activities in which you were successful: Athletics: ☒ Music: ☒ Dramatics: ☒ Class officers: ☒ Societies: ☒

EMPLOYMENT RECORD

(Start with MOST RECENT employment. Explain lengthy periods of unemployment. Go back at least five years.)

DATES (Mo. & Yr.)		EMPLOYER	MAILING ADDRESS	MONTHLY EARNINGS	POSITION HELD	REASON FOR LEAVING
From	To					
Nov. 1956	Present	Odessa Air Service	Box 3133, Odessa, Texas	\$400	Instructor	Present
Jan. 1954	Nov. 1956	Chaparral Aviation, Inc.	Box 221 E, Rt 3-Lubbock, Texas		Pilot	Advancement
		Student				

MILITARY RECORD

Branch and dates of service:

Type of discharge:

State full details of Reserve affiliation:

REFERENCES

(List three persons who have known you for five years or longer, to whom we may refer for information as to your character, habits, initiative, ability, etc. DO NOT REFER TO RELATIVES OR FORMER EMPLOYERS.)

NAME	MAILING ADDRESS	YEARS KNOWN	OCCUPATION
Forrest B. Coburn	4221 Backdale, Dallas, Texas	15	Waste Department
J. E. Edgar	2704 - 19th, Lubbock, Texas	7	Businessman
Mrs. W. B. Stockman	2122 - 16th, Lubbock, Texas	7	Retired

DO NOT WRITE BELOW THIS LINE

Starting rate: Effective date:

Department:

Date of physical exam:

(Dept. Representative) (Employment Mgr.) (Personnel Director)

APPLICANTS FOR PILOT, HOSTESS, MAINTENANCE OR COMMUNICATIONS WORK
MUST FILL IN APPROPRIATE SPACES ON THIS PAGE

PILOTS

QUALIFICATIONS:

1. EDUCATION: High school, some college preferred
2. AGE: Not under 21 nor over 30 years
3. HEIGHT: Minimum 5'8"
4. HEAVINESS: Ability to pass Class I CAA physical exam.
5. VISION: 20/40 without correction
6. LICENSES: CAA Commercial Pilot, CAA Instrument rating
7. FLIGHT TIME: Minimum 2000 hours
(Flight time must be substantiated by certified log or record)

Pilot Certificate No.: 1303604 Grade: Comm Instructor's rating: yes

Aircraft Equipment Ratings: (Land): S.E.L. (Water):

Total Hours: 1100 Night: 41 Cross Country: 450 Hours as (First Pilot): 1100 (CofPilot):

List types of aircraft flown: Howard-Cessna (135, 140, 142, 149, 172, 170, 140, 120, 910) Piper, Stearman, Luscombe

Soloed on: (Type of Aircraft): Taylorcraft At: (City): Lubbock, Texas Date:

Instrument Time: (Actual): 5 hrs (Simulated): 1. Hood: 21 hrs 2. Link: 15 hrs Type rating:

What military pilot rating do you hold? None Nature and date of waivers: None

What training have you had in: 1. Meteorology? American Flyers 2. Navigation? American Flyers

3. Radio? American Flyers 4. Aircraft Instruments? American Flyers

Give date, place, type aircraft, circumstances and penalties on: None

1. Accidents you have had resulting in injury or death of passengers: None

3. Violations with which you have been charged: None

State total hours flown and equipment used in last six months: 600 hrs - Cessna - Piper - Stearman - Howard - Luscombe

Date of last physical exam: February 4, 1957 Class: 2nd Waivers: None

MECHANICS

Show amount of aircraft experience in each type of work for which qualified:

TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)	TYPES OF WORK	EXPERIENCE (Years)
Aircraft Engine Maintenance		Airplane Overhaul		Line Service	
Aircraft Engine Overhaul		Instrument and/or Electrical		Special Training	
Airplane Maintenance		Sheet Metal		Other	

Do you hold valid C.A.A. licenses? "A" No. "E" No. "A & E" No.

List types of airplanes or engines familiar with and amount of experience on each:

[Vol. 486]

COMMUNICATIONS

F.C.C. radio operator license held: (No.): 10C1602 (Class): Restricted (Expires?): Indefinitely

How much total experience as radio-telephone operator? _____ Teletype operator? _____

☐ If you are applying for radio maintenance work, give detailed account of specialized training and experience: _____

Continental Air Lines, Inc.

APPLICATION FOR EMPLOYMENT

The information given on this blank will be treated strictly confidential. It is the applicant's responsibility to answer each question fully and accurately. The use of this blank does not obligate the company. This application is valid for 90 days. When considering your future plans will be taken and that a physical examination satisfactory to the company must be passed before employment can be secured.

I agree that all information given by me in this application is correct to the best of my knowledge and belief and that any untrue statements made herein or any concealment of facts shall be cause for and account by me for just cause for discharge from the service of this company. I agree that my employment by the company is temporary until such time as my application is approved or rejected by the Personnel Director.

Stamps or clip two photos of head and shoulders not over 1 1/2 x 1 1/4 inches taken within the last 12 months.

(Do not paste photo)

Signature of applicant

PERSONAL HISTORY

27 APRIL 1957

Type of Work or Position Desired

PILOT

First or Type Name

GREEN

MARION

DEWITT

NEGRON

Present Address

734 S. SMITH AVE

E. DORADO, ARKANSAS

ARIZONA

DAVIDSON

Home Address

734 S. SMITH AVE

E. DORADO, ARKANSAS

ARIZONA

DAVIDSON

In care of (if any) notify:

MRS MARION D. GREEN

734 S. SMITH AVE

ARIZONA

DAVIDSON

Age

27

Date of Birth

June 6, 29

Place of Birth

Social Security No.

430-38-7963

Expected \$

600.00

Locality Preferred

Descent

AMERICAN

U. S. Citizen

YES

Native or Naturalized

YES

Will you accept temporary work?

Will you accept night work?

YES

If on playground you furnish a sufficient quantity of other proof of citizenship immediately?

YES

What is your selective service classification?

What is your selective service classification?

INSERVICE AT PRESENT

Has bond ever been refused you or cancelled?

NO

Own your home

NO

Day Home

18

Rent

NO

Share

NO

Live with Parents

NO

Single

NO

Married

YES

Date of Marriage

29 DEC 1951

Separated

NO

Divorced

NO

What is the general condition of your health?

EXCELLENT

What physical handicap do you have?

NONE

Height

6'0"

Weight

190

Hair Color

BROWN

Color of Eyes

BLACK

Complexion

FAIR

Glasses

NO

Reason

USAF AT PRESENT, EXPECT DISCHARGE 1 MAY 57

Of what military organization, if any, are you a member?

USAF AT PRESENT, EXPECT DISCHARGE 1 MAY 57

Have you any objection to being transferred to another state in the course of your employment?

NO

Are you a member of the Communist Party?

NO

Are you a member of the American-Soviet Society?

NO

Life insurance carried \$

10,000

Do you carry health and accident insurance?

YES

Do you have other than your salary

10.00

Do you have any debts or financial obligations (incl. auto loan)?

NO

If "Yes" explain fully

70

DEPENDENTS

List below your dependents (Check whether totally or partially dependent.)

NAME	AGE	RELATIONSHIP TO YOU	BIRTH DATE	TOTAL OR PARTIAL DEPENDENT
ELANOR M. GREEN	34	WIFE	2 July 1922	TOTAL
ROBERT R.	4	SON	5 March 1953	"
ORLA T.	3	DAUGHTER	28 June 1954	"
PETER Y.	2	SON	19 July 1955	"
MONICA H.	1	DAUGHTER	7 August 1956	"

FAMILY HISTORY

Father's Name McKinley (NM) GREEN Birthplace EL DORADO ARK. Occupation DOMESTIC SERV.
 Mother's Name LUCY B. Birthplace VICKSBURG, MISS. Occupation HOUSEWIFE
 No. of Sisters 1 No. of Brothers 3 If married, birthplace of Husband or Wife BOSTON, MASSACHUSETTS

EMPLOYMENT RECORD

Include all positions since leaving and during school in chronological order. Start with your present or most recent employment. Account fully for your unoccupied time. Be exact as to dates.

TIME EMPLOYED	EMPLOYER	ADDRESS	POSITION HELD OR TYPE OF DUTY	MO. SALARY (If Comm. Give Average Monthly Earnings)	WHY DID YOU LEAVE
From	To				
Mo. <u>MAR</u> Mo. <u>MAR</u> Yr. <u>50</u> Yr. <u>50</u>	<u>USAF</u>	<u>BASES IN TEX. LA. ONI.</u>	<u>OFFICER-PILOT</u>	<u>\$625.00</u>	<u>TO MAKE CAREER AS AIRLINE PILOT</u>
Mo. <u>FEB</u> Mo. <u>MAR</u> Yr. <u>48</u> Yr. <u>50</u>	<u>USAF</u>	<u>BASES IN TEXAS AND TERE OF HAWAII</u>	<u>AIRMAN</u>	<u>\$110.00</u>	<u>TO BECOME A.F. PILOT & OFFICER</u>
Mo. <u>JAN</u> Mo. <u>FEB</u> Yr. <u>48</u> Yr. <u>48</u>	<u>UNEMPLOYED</u>	<u>734 S. SMITH AVE</u>	<u>---</u>	<u>NONE</u>	<u>TO ENTER USAF</u>
Mo. <u>SEP</u> Mo. <u>JAN</u> Yr. <u>47</u> Yr. <u>48</u>	<u>IN SCHOOL</u>	<u>EPHRAIM APOSTOLIC COLL.</u>	<u>SEMINARIAN</u>	<u>NONE</u>	<u>DETERMINED LACK OF PRIESTLY VOCATION</u>
Mo. <u>JUN</u> Mo. <u>SEP</u> Yr. <u>47</u> Yr. <u>47</u>	<u>BOWLES CONSTR. CO.</u>	<u>DETROIT, MICH.</u>	<u>LABORER</u>	<u>\$240.00</u>	<u>TO ENTER SEMINARY</u>
Mo. <u>JUN</u> Mo. <u>JUN</u> Yr. <u>47</u> Yr. <u>47</u>	<u>UNEMPLOYED</u>	<u>734 S. SMITH</u>	<u>---</u>	<u>NONE</u>	<u>TO SEEK EMPLOYMENT</u>
Mo. <u>SEP</u> Mo. <u>MAY</u> Yr. <u>46</u> Yr. <u>47</u>	<u>IN SCHOOL</u>	<u>5116 LAMBOURG</u>	<u>H.S. STUDENT</u>	<u>NONE</u>	<u>SCHOOL TERMINATION</u>

EDUCATION

List below a complete record of schools attended:

SCHOOL	NAME OF SCHOOL	LOCATION	YEARS ATTENDED		GRADUATED		SPECIALIZATION (List Degrees)
			From	To	Yes	No	
Elementary	FAIRVIEW GRAMMAR	EL DORADO, ARK.	1935	1942	✓		ACADEMIC
High	UNION HIGH	NEW ORLEANS, LA.	1942	1947		✓	
Academy or Trade	XAVIER UNIV. PREP.	NEW ORLEANS, LA.	1946	1947	✓		
	USAF FLYING TRNG.	RAVENSFORD FIELD, TEX. 365TH AFB, TX	1950	1951	✓		PILOT TRAINING
College	PASSED COLLEGE	GED TEST	1948	PASSED 2CX (COLL. EXAM)			1952
University	EPHRAIM APOSTOLIC COLLEGE	NEW BURG, N.Y.	1947	1947		✓	SEMINARIAN
Other	USAF Sq. OFFICER CREW	MAXWELL FIELD, ALA.	1952	1952	✓		OFFICER TRAINING

If you attended a university or college and failed to obtain your degree, state why DETERMINED MY LACK OF PRIESTLY VOCATION PRIOR TO COMPLETION OF STUDIES.

What quarter of your class did you graduate? --- Check the college activities in which you were successful—Athletics ---

Collections --- Music --- Dramatics, etc. --- Honorary Societies --- Clean and Club Offices --- Others ---

Are you a member of any fraternities or clubs? NONE

If you received any college expenses, if any, did you earn? ALL

What hobbies do you have? PHOTOGRAPHY, BOOKS, READING, LISTENING TO RADIO RECORDINGS, DRIVING.

What languages do you speak and write? ENGL. STUDIED FRENCH FOR TWO YEARS IN H.S.

REFERENCES

Give the names and addresses of four persons you have known for five years or more and to whom you can refer as to your character and ability. Do not refer to any relative or an employee of the company.

Name	Address	City and State	Occupation
Mr. J. H. Fichter, C. T.	Notre Dame University	Indiana	Priest - Sociologist
Mr. Bernard G. G. G.	1863 Greenway South	Columbus, Ohio	CHA Tower Operator
Miss Helen McDaniel	414 Derper Road	"	Social Worker
Mr. Edward Kammerer	"	Sioux City, S. Dakota	Rancher - Teacher

RELATIVES IN COMPANY

Are you related to any officers, directors or employees of this company? No If so list below:
(Yes or No)

Name	Position	Relationship

IF YOU ARE QUALIFIED FOR ANY OF THE FOLLOWING POSITIONS, PLEASE ANSWER ANY OR ALL OF THE QUESTIONS

PILOT

(THE FOLLOWING FLYING TIMES MUST BE SUBSTANTIATED BY CERTIFIED LOG OR RECORD)

1364938

Pilot Certificate Private Grade COMM. Aircraft Equipment MULTI Ratings: Land YES - Water YES - MULTI

Instructors License or Ratings: _____

Total Hours 3071:30 Approx. Hours as: Student 1838:15 (1) First Pilot 778:45

Types of Airplanes Flown: C-45, 47-54, 97, B-25, -26, -29, SA-16, SH-19, T-6, -33

Rated on T-6 "Texan" Airplane, at (City) Wichita, Kan. Date 26 May 1950

What military airplane pilot rating do you hold? PILOT (NO STAR) Nature and Date of license waiver: UNKNOWN

What training have you had in: (1) Meteorology AF Flying School 7 yrs flying (2) Navigation? SAME AS METEOR.

(3) Radio SAME AS METEOR. (4) Aircraft Instruments? SAME AS METEOR.

NOTE: (Give place, date, type airplane, circumstances and penalties)

(1) Accidents you have had resulting in injury or death of passengers: NONE

(2) Accidents you have had resulting in injury or death of property: NONE

101-490

RADIO

Radio License Class None No. None Date None Original License None Class None Date None Other Licenses Held None Receive on Typewriter None

State any other training or knowledge in radio USAF Flying School, B-29, SA-16, C-97 AND T-33
ENGINEERING (GROUND) SCHOOLS PLUS 7 YRS. PILOTING EXPERIENCE USING
VHF, HF, UHF, OMNI, IBS, AND ZR RECEIVERS.

MECHANICAL

State Amount of Aeronautical Experience (in years) None Line Maintenance None Overhaul None Manufacturing None Can Complete Set of Tools? None

Other mechanical experience None

OFFICE

State amount of experience in following: Filing None Dictaphone None Machines None

Other Business None Shorthand Speed? None Tape Speed - Wds. per Min. None Typing Speed? None Wds. per Min. None

Accountant		Comptometer Oper.		Statistical Clerk	
Auditor		IBM Operator		Stock Clerk	
Billing Clerk		Pay Roll Clerk		Other	
Bookkeeper		Shipping Clerk			

REMARKS:

EXPECT TO RECEIVE COMM. PILOT LICENSE (PILOT LAND, SEA AND INSTRUMENT)
15 MAY 1957 WITH CAA CLASS 1 MEDICAL CERTIFICATE
JOSEPH COLLEGE LEVEL G.E.D., (2) ARMED FORCES 2 CX TEST (2YR COLL. EQUIV.) AND
AVIATION CADET 2YR COLLEGE EQUIV. TEST.
AT CAPTAIN AT TIME OF DISCHARGE - 8 MAY 1957.

INSTRUCTIONS TO EMPLOYING OFFICER

Employing officer or his clerk must see that applicant fills out one copy of form P-134 for each reference checked by interviewer. These to be attached to this application and promptly forwarded to Personnel Department, Denver, after applicant has been qualified by medical examiner and the portion below has been filled out.

Job AC None (Job Classification) Effective Date None

Department None

(EMPLOYING OFFICER MUST SIGN THIS APPLICATION)

I have personally reviewed this application and recommend employment if investigation of references prove satisfactory.

(Personal Signature of Employing Officer) None (Title) None Date None

Approved: Date None

[fol. 492]

(Letterhead of Holland & Hart, Denver 2, Colorado)

June 18, 1958

Mr. Edward Miller, Chairman
Colorado Anti-Discrimination Commission
University Building
Denver 2, Colorado

Re: Marlon D. Green vs. Continental Air Lines, Inc.

Dear Mr. Miller:

There are enclosed letters from the five pilot applicants reflecting their flying experience, as per our letter of May 13, 1958.

We regret the delay in submitting this information to the Commission but these pilots were widely scattered and it was difficult to trace some of them. The information contained herein has not, of course, been verified by Continental Air Lines but we have no reason to disbelieve its accuracy.

Very truly yours,

HOLLAND & HART

By /s/ WILLIAM C. McCLEARN
William C. McClearn

WCMcC:B
Enclosures

220

[fol. 493]

(Western Union Telegram Form)

1958 JUN 13 AM 11 54

A LLJ217 36 8 EXTRA COLLECT=EASTPOINT GA
13 1250PME=

K C SORBY, EMPLOYMENT MANAGER=
CONTINENTAL AIR LINES INC DVR=

TOTAL MULTI ENGINE HOURS AS OF JULY 1957
— — — 934.0 TOTAL SINGLE ENGINE HOURS SAME
THE 300.0 TOTAL PILOT HOURS TO JULY 1957 —
1234.0— TOTAL FIRST PILOT 783.4=

MARK T STEARNS JR 2301 DRAPER DRIVE
PO-6-5766
COLLEGE PARK GA==

[fol. 494]

May 13, 1958

Mr. Sherl C. George
Co-Pilot
Dallas, Texas

Dear Mr. George:

We find ourselves in need of some additional information not available on your original application. We should appreciate your indicating below the number of hours of multi-engine and/or jet pilot time you had flown as of July 1, 1957.

Many thanks for your prompt handling of this request.

Yours very truly,

K. C. Sorby,
Manager, Employment and
Employee Relations

Total hours flown in multi-engine aircraft prior to July 1,
1957 897:23

Total jet time flown prior to July 1, 1957 None

Signature S. CLARK GEORGE

[fol. 495]

(Letterhead of Continental Air Lines, Denver 16, Colorado)

May 13, 1958

Mr. James B. Bryant

11713 E. 17th

Aurora, Colorado

Dear Jim:

We find ourselves in need of some additional information not available on your original application. We should appreciate your indicating below the number of hours of multi-engine and/or jet pilot time you had flown as of July 1, 1957.

Many thanks for your prompt handling of this request.

Yours very truly,

/s/ KEN C. SORBY

K. C. Sorby,

Manager, Employment and
Employee Relations

Total hours flown in multi-engine aircraft prior to July 1,
1957 5 hours

Total jet time flown prior to July 1, 1957 None

Signature J. B. BRYANT

[fol. 496]

(Letterhead of Continental Air Lines, Denver 16, Colorado)

May 13, 1958

Mr. Charles E. Dresser

1914 E. Willow St.

Anaheim, California

Dear Mr. Dresser:

We find ourselves in need of some additional information for some research we are doing. This information is not available on your original application. We should appre-

ciate your indicating below the number of hours of multi-engine and/or jet pilot time you had flown as of July 1, 1957.

Many thanks for your prompt handling of this request.

Yours very truly,

/s/ K. C. SORBY
K. C. Sorby,
Manager, Employment and
Employee Relations

Total hours flown in multi-engine aircraft prior to July 1, 1957. None

Total jet time flown prior to July 1, 1957 None

Signature CHAS. E. DRESSER

[fol. 497]

(Letterhead of Continental Air Lines, Denver 16, Colorado)

June 4, 1958

Mr. Howard F. Cole
6205 St. John Avenue
Minneapolis, Minn.

Dear Mr. Cole:

We find ourselves in need of some additional information for some research we are doing. This information is not available on your original application. We should appreciate your indicating below the number of hours of multi-engine and/or jet pilot time you had flown as of July 1, 1957.

Many thanks for your prompt attention to this request.

Yours very truly,

/s/ K. C. SORBY
K. C. Sorby,
Manager, Employment and
Employee Relations

Total hours flown in multi-engine aircraft prior to July 1, 1957 200

Total jet time flown prior to July 1, 1957 800

Signature HOWARD F. COLE

[fol. 498]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

No. 25

MARLON D. GREEN, Complainant,

VS.

CONTINENTAL AIR LINES, INC., Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

[fol. 506]

FINDINGS OF FACT

The Complainant alleges a violation of the Colorado Anti-Discrimination Act of 1957, basically in the allegation that the Respondent refused to employ the Complainant as a commercial air line pilot because he is a Negro. The Respondent denies that it has violated the Act. It questions the jurisdiction of this Commission and the constitutionality of the Act.

The Complainant is a resident of 608 North Logan, Lansing, Michigan and is presently engaged as the Department Pilot for the Michigan State Highway Department.

The Respondent is a duly authorized and certificated commercial carrier by air and maintains an office at Stapleton Airfield, Denver, Colorado.

Complainant filed application for employment as a pilot with the Respondent on April 30, 1957; the application contained a request for two photographs of head and shoulders not over 1½ x 2½ inches taken within the last 12 months and which application also had a space for racial identity.

At the time Complainant made application for employment with Respondent, he was a rated pilot so designated by the U. S. Air Force, as of 24 March 1951.

Complainant during his military career had flown the T-6 Trainer, the B-25, the B-29, the B-26, the 5A-16, the C-45 or Twin Beach, the C-97 and C-47.

[fol. 507] The Complainant as of June 26, 1957 had logged 3,071 hours flying time as evidenced by Air Force Form 5, on file with the Director of Flight Safety Research, Norton Air Force Base, California.

Complainant's rank when discharged from the Air Force was that of Captain.

Complainant arrived in Denver, June 24, 1957 for employment interview with Respondent.

Complainant was directed by Captain Cramp to the link trailer department for a check ride in the link trainer.

On the following day Complainant took a flight check with Captain Cramp and after the flight check, was advised that he could return to Lansing, expecting the reply from Respondent in about ten days.

Complainant was not selected for the July training class; Complainant's application was kept in a file of eligible checked out-pilots. He was still retained as an eligible candidate for pilot position. It was admitted that he was a good pilot and met Respondent's minimum qualifications.

Complainant's application was withdrawn from further consideration in the early part of August because Respondent was made aware of some publicity appearing in the Albuquerque Journal of August 4.

The Respondent is guilty of a discriminatory and unfair employment practice in requiring on its application form, the racial identity of the applicant and the requirement of a photo to be attached to the application, each of which is contrary to regulations adopted by this Commission under Section 4, sub-section 2 of Chapter 176, Session Laws of 1957, also known as the Colorado Anti-Discrimination Act of 1957.

[fol. 508] From the applications submitted to the Commission for review, we find:—

Applicant, Marlon D. Green with a total of 3,071:30 flying hours with multi-engine equipment.

Applicant No. 2 with a total of 1,150 flying hours.

Applicant No. 3 with a total of 1,000 flying hours in single engine equipment, mostly jet.

Applicant No. 4 with a total of 2,100:53 flying hours.

Applicant No. 5 with a total of 1200 flying hours, in multi-engine equipment.

Applicant No. 6 with a total of 1031 flying hours in single engine equipment.

Based on a review of the applications for employment of the several persons interviewed at the time Mr. Green was interviewed, it appears that Complainant had more flying hours than any other applicant and was better qualified for the position of co-pilot than any applicant interviewed, but was not hired because of the discriminatory act of Respondent.

In spite of the fact that the Respondent properly asserts that this position is an extremely important one, dealing with human lives as it does, the evidence does not show that the Respondent exercised extreme care in the selection of the applicants for the training school; on the contrary it was difficult, if not impossible to determine from the Respondent's testimony, although the witnesses were asked repeatedly, who was charged with the selection of the successful applicants. The evidence is conclusive on the basis of the [fol. 509] testimony that the only reason that the Complainant was not selected for the training school was because of his race.

CONCLUSIONS OF LAW

The Commission assumes constitutionality of the law.

The Commission has jurisdiction to hear the complaint.

The Commission finds that there is a violation as charged in the complaint.

ORDERS

The Complainant has requested this Commission to withdraw his complaint. Rule 2 (j) of the Rules of the Commission provides with respect to withdrawal as follows: " * * * if the request for withdrawal is made after the case has been noted for hearing the written consent of a majority of the hearing examiners shall be obtained." A majority of the hearing examiners have not consented to such withdrawal. Accordingly it is hereby ordered as follows:

The Respondent shall cease and desist from such discriminatory and unfair employment practice.

The Respondent shall give to the Complainant the first opportunity to enroll in its training school in its next course,

and the priority status of the Complainant shall be fixed as of June 24, 1957.

In view of Complainant's request that his complaint herein be withdrawn, he is directed to advise this Commission in writing on or before January 10, 1959 of his willingness to enter the next pilot training course to be conducted by Respondent. In the event of Complainant's failure so to do the Respondent will be released of the obligation [fol. 510] of the order entered herein to place him in such class. In the event Complainant elects within the time mentioned to enter such class, the Commission shall advise the Respondent of such election and thereupon such written advice to the Respondent shall be deemed the service of an order of the Commission pursuant to Section 6 of the Act, and Respondent shall be allowed thirty (30) days from the service of such order in which to file its statutory petition for review in the district court under the provisions of Section 7 of the Act.

The Commission retains jurisdiction of the matter under the provisions of the Act.

By Order of the Commission

Roy M. Chapman, Coordinator

[fol. 512]

BEFORE THE COLORADO ANTI-DISCRIMINATION COMMISSION

Complaint No. 25

[Title omitted]

NOTICE OF ELECTION TO ENROLL IN PILOT TRAINING CLASS

In the matter of the complaint above named and the Commission's orders issued and served upon the parties under date of December 19, 1958:

The Respondent above named is hereby notified that the Complainant above named has notified the Commission in writing under date of December 31, 1958, and in accordance with the provisions of said orders that he has elected to enroll in the Respondent's next pilot training class.

In Witness Whereof, These presents have been duly executed and served upon the Respondent this 7th day of January, 1959.

Colorado Anti-Discrimination Commission, 655
Broadway Building, Denver 3, Colorado, By Roy
M. Chapman, Coordinator.

[fol. 513]

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. B29648

[Stamp—Filed in District Court, City & County of Denver,
Colorado, Feb. 3, 1959]

CONTINENTAL AIR LINES, INC., Petitioner,

vs.

COLORADO ANTI-DISCRIMINATION COMMISSION, and EDWARD
MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE,
and ROBERT O. CORY, Commissioners of said Commission,
and MARLON D. GREEN, Respondents.

COMPLAINT

PETITION FOR REVIEW PURSUANT TO
1953 CRS 80-24-8 (Supp.)

[Stamp—Filed in the Supreme Court of the State of Colorado, Sep. 23, 1959, George A. Trout, Clerk]

Comes Now the above-named Petitioner by its attorneys and for its Petition for Review and Complaint against Respondents states and alleges as follows:

1. Petitioner, a duly certificated commercial carrier by air, is a corporation qualified and doing business in the State of Colorado. Petitioner maintains an office at Stapleton Airfield, Denver, Colorado.

2. Respondent Colorado Anti-Discrimination Commission (hereinafter referred to as "Commission") is an agency of the State of Colorado created and organized pursuant to the provisions of the Colorado Anti-Discrimination Act of 1957 (1953 CRS, c. 80, Art. 24 (Supp.)). Respondents Milier, Budin, Bellinger, Manzanares, Keeler, White, and Cory are the duly appointed and acting Commissioners of [fol. 514] said Commission. Respondent Green is an individual who filed a complaint against Petitioner with the Commission.

3. On or about August 13, 1957, Respondent Green filed a written complaint against Petitioner with the Commission. By order dated March 28, 1958, the Commission directed that a hearing be held on said complaint. Petitioner filed its answer to the complaint and a hearing was held by the Commission on May 7 and 8, 1958, in the offices of the Commission at 655 Broadway Building, Denver, Colorado. On December 19, 1958, the Commission issued its Findings of Fact, Conclusions of Law and Orders in the within matter and on January 7, 1959, the Commission issued its Notice and Final Order.

4. Petitioner alleges that it is aggrieved by the orders issued by the Commission and brings this action, pursuant to the provisions of 1953 CRS 80-24-8 (Supp.), to review the proceedings held and orders entered by the Commission in the within matter. Petitioner prays that the Commission be ordered to certify to this Court a transcript of the records and proceedings made and had in this matter, that the orders of the Commission be reviewed, and for the following relief:

First Claim for Relief

Petitioner moves the Court for an order directing the Commission to vacate and set aside the orders heretofore issued by the Commission against Petitioner and to dismiss the complaint filed against Petitioner by Respondent Green on the ground (1) that the Commission is without jurisdiction over the subject matter of this proceeding, and (2) [fol. 515] that the Commission has purported to act in excess of its jurisdiction in this proceeding.

Second Claim for Relief

1. Petitioner is engaged in the transportation of passengers and freight by air in and between the States of California, Colorado, Illinois, Kansas, Missouri, New Mexico, Oklahoma, and Texas by virtue of and subject to the laws, statutes and regulations of the United States applicable to interstate commercial carriers by air.

2. By such laws, statutes and regulations the United States has reserved to its exclusive jurisdiction the regulation and control of interstate commercial carriers by air pursuant to the provisions of Article I, §8, of the Constitution of the United States.

3. Flight crew personnel employed by Petitioner, including pilots, are essential to the conduct of its business in interstate commerce and the performance of their duties by such flight crew personnel necessarily takes place in all or several of the states in which Petitioner conducts its business. A substantial number of Petitioner's flight crew personnel are domiciled and perform all or the major part of their duties in states other than Colorado. By reason thereof the provisions of the Colorado Anti-Discrimination Act of 1957 purporting to regulate and control Petitioner in its operations as an interstate commercial carrier by air, including the regulation and control of the selection and qualification of Petitioner's flight crew personnel, are and constitute an undue burden on interstate commerce in violation of Article I, §8 of the Constitution of the United [fol. 516] States and are unconstitutional and void.

Wherefore, Petitioner moves the Court for an order vacating and setting aside the orders heretofore issued by the Commission and dismissing the complaint filed against Petitioner by Respondent Green, for its costs expended herein, and for such other or further relief as may to the Court seem proper.

Third Claim for Relief

1. The Commission erred by failing to grant Petitioner's Motion to Dismiss at the conclusion of Respondent Green's case-in-chief.

2. The Commission erred in making the following findings of fact in that said findings are not supported by substantial evidence and are contrary to the evidence and the law:

(a) That Petitioner requires the racial identity of an applicant for employment to be indicated on its employment application form.

(b) That a requirement for a photograph of an applicant to be attached to an employment application form is contrary to regulations adopted by the Commission or the Colorado Anti-Discrimination Act of 1957 in the absence of a finding that such requirement expresses or was intended to express a limitation, specification, or discrimination as to race, creed, color, national origin or ancestry, and in the absence of a further finding that such requirement was not based upon a bona fide occupational qualification.

[fol. 517] (c) That Respondent Green was better qualified for the position of co-pilot than any applicant interviewed.

(d) That Petitioner does not exercise extreme care in the selection of applicants for its pilots training school.

(e) That the only reason Respondent Green was not selected for Petitioner's pilot training school was because of his race.

3. The Commission erred in making the following conclusions of law in that said conclusions are not supported by substantial evidence and are contrary to the evidence and the law:

(a) By "assuming" the constitutionality of the Colorado Anti-Discrimination Act of 1957 as applied to Petitioner and the facts of this action and by asserting and purporting to exercise jurisdiction to hear and decide the complaint herein and to issue affirmative orders against Petitioner.

(b) By concluding that the violations charged in the complaint of Respondent Green were committed by Petitioner when in fact there was no substantial evidence to support a finding that any of the violations charged in said complaint have been committed by Petitioner, nor to support a conclusion that Petitioner had violated the Colorado Anti-Discrimination Act of 1957 as charged.

[fol. 518] 4. The Commission erred in receiving into evidence testimony by Roy M. Chapman and John I. Binkley as to statements made by agents of Petitioner during the course of meetings with said Chapman and Binkley, as agents of the Commission, to confer, conciliate and negotiate a settlement of the complaint of Respondent Green. Such conferences were held and statements made by Petitioner's agents in the belief and with the understanding that the same were confidential and privileged. The Colorado Anti Discrimination Act of 1957 is intended to and does provide that such testimony and statements are confidential and privileged. By reason thereof such testimony and statements were incompetent and inadmissible and the reception of such evidence materially prejudiced the substantial rights of Petitioner.

Wherefore, Petitioner moves the Court for an order vacating and setting aside the orders heretofore issued by the Commission and dismissing the complaint filed against Petitioner by Respondent Green, for its costs expended herein, and for such other or further relief as may to the Court seem proper.

Fourth Claim for Relief

1. While continuing to deny that it violated the Colorado Anti-Discrimination Act of 1957 as alleged in Respondent Green's complaint, Petitioner alleges that on or about December 14, 1958, it received a telegram from Respondent Green, a copy of which is attached hereto as Exhibit A.

2. By said telegram Respondent Green attempted to [fol. 519] and did withdraw the complaint he had previously

filed with the Commission against Petitioner. Upon the withdrawal of Respondent Green's complaint the Commission was without jurisdiction to proceed in the within matter.

3. Rule 2(j) of the Rules of Practice and Procedure adopted and published by the Commission purports to limit and condition the right of a complainant to withdraw his complaint by requiring the prior written consent of a majority of the hearing examiners to such withdrawal.

4. The order of the Commission herein recites that a majority of the hearing examiners did not consent to the withdrawal of Respondent Green's complaint.

5. Said Rule 2(j), insofar as it purports to limit the right of a complainant to withdraw his complaint, is inconsistent with and contrary to the purposes and aims of the Colorado Anti-Discrimination Act of 1957, is in excess of the powers and duties conferred upon the Commission by 1953 CRS 80-24-5(3) (Supp.), and constitutes an arbitrary and capricious abuse of discretion by the Commission and by reason thereof is void and unenforceable.

6. The refusal of the majority of the hearing examiners to consent to the withdrawal of Respondent Green's complaint is inconsistent with and contrary to the purposes and aims of the Colorado Anti-Discrimination Act of 1957, is in excess of the powers and duties conferred upon the hearing examiners by said Act, and constituted an arbitrary and capricious abuse of discretion by the hearing examiners, or such of them as refused to consent to the withdrawal of Respondent Green's complaint. By reason thereof such purported refusal to consent is null and void [fol. 520] and without legal effect.

Wherefore, Petitioner moves the Court for an order vacating and setting aside the orders heretofore issued by the Commission, for its costs expended herein, and for such other or further relief as may to the Court seem proper.

Fifth Claim for Relief

1. By order dated March 28, 1958, the Commission docketed the complaint of Respondent Green for hearing before the Commission sitting as hearing examiners.

2. Although 1953 CRS 80-24-4 (Supp.) provides that the Commission shall consist of seven members, only five of the designated hearing examiners were present for the hearing session conducted on the morning of May 7, 1958, only four of the designated hearing examiners were present for the hearing session on the afternoon of May 7, 1958, only three of the designated hearing examiners were present during almost all of the hearing session conducted on May 8, 1958, and only two of the designated hearing examiners were present during all of the taking of the testimony, arguments and hearing held on Respondent Green's complaint against Petitioner.

3. The failure of the designated hearing officers, or even a quorum thereof, to attend the said hearing, and the action of some of the hearing examiners in attending only portions of the hearing and hearing only parts of the testimony and arguments constituted an arbitrary and capricious abuse of the discretion by said hearing examiners and denied to Petitioner the due processes of law in violation of Article II §25 of the Constitution of the State of Colorado and Article XIV §1 of the Constitution of the United States.

[fol. 521] 4. While continuing to allege that the duly designated hearing examiners were acting in excess of their authority and without jurisdiction for the reasons set forth above, Petitioner further alleges upon information and belief that the duly designated hearing examiners, or such of them as had an opportunity to hear all of the testimony and observe all of the witnesses, failed and neglected to make and set forth their findings of fact and decisions to the Commission as required by Rule 11(a) of the Rules of Practice and Procedure adopted and published by the Commission.

5. The findings, conclusions and orders heretofore issued in this matter purport to have been made and entered

by the Commission as a whole. In the absence of findings and decisions as required by said Rule 11(a), it is impossible for this Court or Petitioner to determine which of the designated hearing examiners made findings of fact, evaluated the credibility of the witnesses and made recommendations to the Commission as a whole, or the basis upon which such findings, evaluations and recommendations were made, or whether in fact the designated hearing examiners, or any of them, did make findings, evaluations, or recommendations to the Commission as a whole.

6. The manner in which the hearing was conducted and the failure of the designated hearing examiners and the Commission to comply with the requirements of the Colorado Anti-Discrimination Act of 1957 and the Rules of Practice and Procedure of the Commission as aforesaid constituted an arbitrary and capricious abuse of discretion by the Commission and denied to Petitioner the due processes of law in violation of Article II §25 of the Constitution [fol. 522] of the State of Colorado and Article XIV §1 of the Constitution of the United States. By reason thereof the designated hearing examiners and the Commission were without jurisdiction to proceed and the findings, conclusions, and orders entered herein are void and without legal effect.

Wherefore, Petitioner moves the Court for an order vacating and setting aside the orders heretofore issued by the Commission and dismissing the complaint filed against Petitioner by Respondent Green, for its costs expended herein, and for such other or further relief as may to the Court seem proper.

Sixth Claim for Relief

Petitioner alleges that the findings of fact, conclusions of law and orders of the Commission are in numerous material respects so vague, ambiguous and uncertain that Petitioner is unable to comply therewith and by reason thereof said orders are void and unenforceable.

Wherefore, Petitioner moves the Court for an order vacating and setting aside the orders heretofore issued by

the Commission and dismissing the complaint filed against Petitioner by Respondent Green, for its costs expended herein, and for such other or further relief as may to the Court seem proper.

Holland & Hart, By Patrick M. Westfeldt, William C. McClearn, Warren L. Tomlinson, Attorneys for Petitioner, 520 Equitable Building, Denver 2, Colorado, AMherst 6, 1461.

Address of Petitioner: Stapleton Airfield, Denver, Colorado.

[fol. 523]

— EXHIBIT "A" TO COMPLAINT
(Western Union Telegram Form)

KA018 DEAO15
DE LLA103 PD=LGN LANSING MICH 14 259 AME=
CONTINENTAL AIRLINES
DENVER COLO=

1958 Dec 14 AM 2 15

URGENTLY REQUEST WITHDRAWAL OF MY COMPLAINT AGAINST CONTINENTAL AIRLINE=
MARLON D GREEN=

[Handwritten notation]
Phoned to Bell
at 8:20 AM 12/15 ORH

[Handwritten notation]

CC: R. F. SIX

H. LAWRENCE

P. KRIETHE

H. W. BELL—original

B. McCLEAREN—Holland & Hart

MARK KRAMER

(Western Union Telegram Form)

CCDHCC

DENVER COLO DEC 14 1958
CONTINENTAL AIRLINES
DVR FHK

REGARDING WIRE THIS MORNING FROM LANSING
MICH SIGNED MARLON GREEN—PLEASE COR-
RECT THE TEXT TO READ "FOLLOWING MESSAGE
SENT TO COLORADO ANTI DISCRIMINATION COM-
MISSION 6 BROADWAY BLDG QUOTE URGENTLY
REQUEST WITHDRAWAL OF MY COMPLAINT
AGAINST CONTINENTAL AIRLINES"

WESTERN UNION SERVICE DEPT

[fol. 524] [File endorsement omitted]

Clerk's certificate (omitted in printing).

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. B-29648

CONTINENTAL AIR LINES, INC., Petitioner,

vs.

COLORADO ANTI-DISCRIMINATION COMMISSION, and EDWARD
MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE
MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and
GEORGE O. CORY, Commissioners of said Commission, and
MARLON D. GREEN, Respondents.

ANSWER AND PETITION FOR ORDER ENFORCING ORDER OF THE
COLORADO ANTI-DISCRIMINATION COMMISSION—Filed March
31, 1959

Come Now the Respondents herein, save and except Re-
spondent Marlon D. Green, by their attorneys, Duke W.
Dunbar, Attorney General of the State of Colorado, Charles
Thomas, Assistant Attorney General, and Robert L. Nagel,

Assistant Attorney General, and by way of answer to Petitioner's Complaint and Petition for Review, admit, deny, and allege as follows:

1. Admit the allegations of paragraph numbered 1.
2. Admit the allegations of paragraph numbered 2, except that Respondents deny that Respondent Bellinger is now a member of Respondent Commission, and on the contrary, Respondents allege that the said Respondent Bellinger has resigned as a member of such Commission, and as of this date, such vacancy has not been filled by appointment.
3. Admit the allegations of paragraph numbered 3.
4. Deny the allegations of paragraph numbered 4, except that Respondents admit that this is a proceeding pursuant to the provisions of 80-24-8, C.R.S., 1953, and Respondents affirmatively allege that they have certified to this Court a copy of the transcript of the records and proceedings made and had in this matter before Respondent Commission.

[fol. 525]

For Answer to Petitioner's First Claim for Relief

Respondents deny the allegations and conclusions of Petitioner's First Claim for Relief.

For Answer to Petitioner's Second Claim for Relief

1. Admit the allegations of paragraph numbered 1 of Petitioner's Second Claim for Relief, except that if by such allegations Petitioner intends to allege that its activities and business as an interstate commercial carrier by air are subject solely to the laws, statutes, and regulations of the United States, Respondents deny such allegations. Respondents affirmatively allege that Petitioner's home base and principal place of operation is located in Denver, Colorado.

2. Deny the allegations of paragraph numbered 2 of Petitioner's Second Claim for Relief, and on the contrary, affirmatively allege that the United States has not reserved

to itself exclusive jurisdiction or exclusive regulation and control over all phases of operation of interstate commercial carriers by air; that the United States has not legislated in the field or regulated discriminatory racial practices in employment of interstate commercial carriers by air, either directly or by implication; that the United States has not entered, or preempted, the field of regulation of discriminatory racial practices in employment by interstate commercial carriers by air; and that Petitioner has not shown that enforcement of the Colorado Anti-Discrimination Act of 1957 (80-24-1 C.R.S., 1953, *et seq.*) by Respondents, as against Petitioner, will substantially interfere with the free flow of commerce between the several states, or place an undue burden upon interstate commerce, contrary to the provisions of Article I, Section 8, of the Constitution of the United States.

3. Respondents admit that flight crew personnel employed by Petitioner, including pilots, are essential to the conduct of Petitioner's business, but deny the other allegations and conclusions contained in paragraph numbered 3 of Petitioner's Second Claim for Relief, and on the contrary, affirmatively allege: that such other allegations are not supported by testimony or evidence in the record; that the Order entered by Respondents herein relates solely to [fol. 526] acts of Petitioner occurring totally within the State of Colorado, and does not attempt or purport to effect, control, or regulate the hiring practices of Petitioner which take place elsewhere, or the duties performed by Petitioner's employees elsewhere; that there is no evidence in the record that Petitioner does, in fact, engage in hiring employees elsewhere than in the State of Colorado; that even if Petitioner does hire employees elsewhere, as well as in Colorado, Petitioner has introduced no evidence showing that enforcement of the Colorado Anti-Discrimination Act of 1957 against it would result in any interference with the free flow of commerce, or would place any burden upon interstate commerce, nor has any evidence been introduced as to how, or in what manner, such enforcement would result in a substantial interference with the free flow of commerce, or in placing an undue burden upon interstate commerce.

For Answer to Petitioner's Third Claim for Relief

1. Deny the allegations and conclusions contained in paragraph numbered 1.

2. Deny the allegations of paragraph numbered 2, and on the contrary allege:

A. That there is substantial and competent evidence in the record from which the Commission could, and did, find that Petitioner requires the racial identity of an applicant for employment to be indicated on its employment applications, in that there was evidence before the Commission that: the application form provided Respondent Green contained space for designation of race; the word "negro" was placed upon the application form submitted by Respondent; and all application forms used by Petitioner require the insertion of a photograph of the applicant.

B. That the evidence before the Commission indicates that Respondent Green had more pilot experience of the type and nature sought by Petitioner than did the applicants who were actually chosen by Petitioner for pilot training; that Respondent Green satisfactorily passed all tests submitted to him by Petitioner; and that Petitioner [fol. 527] was satisfied with the personality, character, and appearance of Respondent Green.

3. Deny the allegations and conclusions of paragraph numbered 3 of Petitioner's Third Claim for Relief.

4. Deny the allegations of paragraph numbered 4 of Petitioner's Third Claim for Relief.

For Answer to Petitioner's Fourth Claim for Relief

1. Respondents are without knowledge or information sufficient to form a belief as to the truth of the allegation that Petitioner received a telegram from Respondent Green in the form of a copy which is attached to Petitioner's Complaint and marked Exhibit A.

2. Admit that on or about December 14, 1958, and after the hearing by the Respondent Commission upon his Complaint, Respondent Green sent a telegram to the Commis-

sion, in which he attempted to withdraw a Complaint he had previously filed with the Respondent Commission against Petitioner, but deny the other allegations of paragraph numbered 2 of Petitioner's Fourth Claim for Relief.

3. Admit the allegations of paragraphs numbered 3 and 4 of Petitioner's Fourth Claim for Relief.

4. Deny the allegations of paragraphs numbered 5 and 6 of Petitioner's Fourth Claim for Relief.

For Answer to Petitioner's Fifth Claim for Relief

1. Admit the allegations of paragraph numbered 1 of Petitioner's Fifth Claim for Relief.

2. That with respect to the allegations contained in paragraph numbered 2 of Petitioner's Fifth Claim for Relief, Respondents admit that not all of the Commissioners of the Respondent Commission sat at all times during the hearing on the Complaint of Respondent Green, but deny the other allegations therein.

3. Deny the allegations and conclusions of paragraphs numbered 3, 4, 5, and 6 of Petitioner's Fifth Claim for Relief, and by way of further answer to Petitioner's Fifth Claim for Relief, Respondents affirmatively allege as follows:

[fol. 528] A. That Petitioner is estopped from objecting at this time to the number of Commissioners sitting at the hearing, and has waived any right which it may have had to object thereto had timely objection been made by failing to raise and pursue such objection at the time of the hearing before the Commission.

B. That pursuant to the provisions of 80-24-1 (6) C.R.S., 1953, a hearing may be held before any one or more Commissioners, and the presence of all Commissioners, or a quorum, is not required by the statute.

C. That the statute requires that all testimony and evidence adduced at the hearing be transcribed; that all testimony and evidence taken at the hearing herein was, in fact,

transcribed; and that such transcript was available to and before all members of the Commission at the time of the entry of its findings of fact, conclusions of law, and Order.

For Answer to Petitioner's Sixth Claim for Relief

Respondents deny the allegations and conclusions of Petitioner's Sixth Claim for Relief.

For Further Answer to Petitioner's Complaint

Respondents deny each and every other allegation of Petitioner's Complaint and Petition for Review not specifically and expressly admitted herein.

Wherefore, Respondents, having fully answered Petitioner's Complaint and Petition for Review, pray for judgment in favor of Respondents and against Petitioner; for an Order affirming the Decision and Orders of Respondents; for an Order dismissing Petitioner's Complaint and Petition for Review, and for such other and further relief as to the Court may seem proper.

Counterclaim

(Petition for Order Enforcing Order of the Colorado Anti-Discrimination Commission)

Come Now the above-named Respondents, by their attorneys, and by way of counterclaim and petition state and allege as follows:

1. That on or about August 13, 1957, Respondent Marlon [fol. 529] D. Green filed a written Complaint against Petitioner with the Respondent Commission, wherein he alleged, in part, that Petitioner had violated the Colorado Anti-Discrimination Act of 1957 (80-24-1 C.R.S., 1953, *et seq.*), and that Petitioner had refused to employ him as a commercial airline pilot because he is a negro.

2. That thereafter Petitioner filed its written Answer to the said Complaint of Respondent Green, and pursuant to the Order of the said Respondent Commission, a hearing was had before the Respondent Commission, with respect to the allegations of such Complaint.

3. That after the conclusion of such hearing, the Respondent Commission entered its findings of fact, conclusions of law, and Orders, (a copy of which is contained in the return of Respondent Commission in this action), in which the Commission found that Petitioner had refused to employ Respondent Green as a commercial airline pilot, and had refused to do so because Respondent Green is a negro.

4. That as a result of such findings, the Respondent Commission determined that Petitioner had violated the Colorado Anti-Discrimination Act of 1957, and ordered as follows:

"The Respondent shall cease and desist from such discriminatory and unfair employment practice.

"The Respondent shall give to the Complainant the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957.

"In view of Complainant's request that his complaint herein be withdrawn, he is directed to advise this Commission in writing on or before January 10, 1959 of his willingness to enter the next pilot training course to be conducted by Respondent. In the event of Complainant's failure so to do the Respondent will be released of the obligation of the order entered herein to place him in such class. In the event Complainant elects within the time mentioned to enter such class, the Commission shall advise the Respondent of such election and thereupon such written advice to the Respondent shall be deemed the service of an order of the Commission pursuant to Section 6 of the Act, and Respondent shall be allowed thirty (30) days from the service of such order in which to file its statutory petition for review in the district court under the provisions of Section 7 of the Act.

[fol. 530] "The Commission retains jurisdiction of the matter under the provision of the Act."

5. That in pursuance of such Order, Respondent Green advised the Commission by letter dated December 31, 1958,

of his willingness to enter the next pilot training course to be conducted by Petitioner, and that on or about January 7, 1959, notice of the election by Respondent Green to enroll in Petitioner's next pilot training course was served upon Petitioner.

6. That as of this date, Petitioner has not enrolled, or offered to enroll, Respondent Green in any pilot training course.

7. That upon information and belief, Respondents believe, and therefore allege, that unless ordered to do so by this Court, Petitioner will refuse to enroll Respondent Green in its next pilot training course, contrary to the Order of these Respondents.

8. That Petitioner has now commenced this action in this Court, seeking a review of the Orders made and entered by Respondent Commission, and as a result of such proceeding, considerable time may elapse before the validity of the Orders of Respondent Commission has finally been determined by this Court, or by any subsequent reviewing Courts.

9. That upon information and belief Respondents believe, and therefore allege, that Petitioner may employ additional pilots, or accept other persons for training as pilots, during the period of time necessary to conclude the review proceedings commenced by Petitioner—all to the detriment of the rights and interests of Respondent Green.

10. That as a result of the commencement of Petitioner's review proceedings, and the resultant delay in the enforcement of the Orders of Respondent Commission, and in order to protect the rights and interests of Respondent Green, and to more fully carry out and effectuate the intent of the Orders entered by the Respondent Commission, it is necessary that the Court enter a temporary or supplementary Order, requiring Petitioner to file periodic reports with the Respondent Commission, setting forth whether or not it has hired additional pilots or accepted [fol. 531] additional persons for training as pilots, the qualifications of any such persons so hired or accepted, and the date of such hiring or acceptance, together with the compensation being paid such persons.

Wherefore, Respondents pray as follows:

1. For an Order of this Court, pursuant to the provisions of 80-24-8 (1) and 80-24-8 (3), C.R.S., 1953, enforcing the Order of the Colorado Anti-Discrimination Commission above described.

2. For an Order of this Court, directing and requiring Petitioner to enroll Respondent Marlon D. Green in its next pilot training course.

3. For such other and further relief as this Court may deem necessary to secure compliance with, and enforcement of, the Orders of the Colorado Anti-Discrimination Commission and this Court, including, but not by way of limitation, relief by way of injunction or temporary orders.

4. For a Supplementary Order requiring Petitioner to file written reports with the Respondent Commission, and with this Court, on or before such day as may be fixed by this Court, covering the period from and after June 24, 1957, and to thereafter file quarterly reports until further Order of this Court, containing the following information:

A. Whether Petitioner has employed any additional pilots or accepted any additional pilots for pilot training.

B. The names and addresses of any such persons and their qualifications as pilots upon which they were so selected.

C. The date of employment or acceptance for pilot training.

D. The compensation being paid such persons.

5. For costs, and for such other and further relief as to the Court may seem proper.

Duke W. Dunbar, Attorney General, State of Colorado; Charles S. Thomas, Assistant Attorney General; Robert L. Nagel, Assistant Attorney General; Attorneys for Respondents, Colorado Anti-Discrimination Commission, and Commissioners thereof.

Address of Respondents: State Capitol Building, Denver 2, Colorado.

[fol. 532]

[File endorsement omitted]

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. B-29648

CONTINENTAL AIR LINES, INC., Petitioner,

vs.

COLORADO ANTI-DISCRIMINATION COMMISSION and the COMMISSIONERS of said COMMISSION, and MARLON D. GREEN, Respondents.

ANSWER OF MARLON D. GREEN—Filed March 31, 1959

Comes now the respondent Marlon D. Green, by his attorney T. Raber Taylor, and in answer to the Petition for Review filed by Continental Air Lines, Inc., asks the Court with deliberate speed to enter an order and decree enforcing the orders of the Commission and in the alternative, if the proceedings be remanded to the Commission that the Commission be directed to enter a back pay award for training for the period beginning June 24, 1957.

Respondent directs the attention of the Court to the discouraging delay. Like many other U. S. Air Force pilot officers, respondent sought employment as a commercial air line pilot. While still stationed with the Air Force in Japan with the rank of Captain, he sent letters of application to most of the major air lines in the United States. Later when he was discharged and returned to the United States he made applications personally, by mail, and by telephone. About April 20, 1957, on his return from Japan he secured an employment application form from the Continental Air Lines, Inc. office in San Francisco and sent it to the Denver office for consideration for pilot employment. (Tr. p. 48) For four months he diligently sought employment as a commercial pilot. At the end of this time he accepted employment with the Michigan Highway Department.

[fol. 533] In answer to the first four numbered paragraphs of the petitioner's Petition for Review, respondent states:

1. The facts stated in paragraph 1 are admitted.
2. The facts stated in paragraph 2 are admitted.
3. The facts stated in paragraph 3 are admitted.
4. The allegation stated in paragraph 4 that petitioner is aggrieved by the orders issued by the Commission is denied. The remaining matters are admitted.

I. The Commission has Jurisdiction

a. The Commission has jurisdiction over the subject matter of this proceeding.

b. The Commission in this proceeding acted within the grant of its jurisdiction although it did not exercise the plenitude of its authority.

II. The Record and Proceedings Present No Facts Indicating a Burden on Interstate Commerce

In answer to petitioner's Second Claim for Relief, respondent states:

a. The facts alleged in paragraphs 1, 2, and 3 in so far as they are supported by evidence in the record, are admitted. Allegations of fact not supported by the evidence in the record, conclusions of law and interpretation of laws, statutes and regulations are denied.

b. There is no evidence in the record that the prohibition against discrimination in hiring on account of race or color constitutes a burden on interstate commerce.

c. In answer to paragraph 2 it is stated that officials of the United States of America have studied racial discrimination in private industries that engage in interstate commerce and bills have been introduced in the Congress of the United States to prohibit racial discrimination in such industries. Nevertheless as of June 24, 1957, no law or regulation of the United States or any of its agencies ex-

pressly prohibited racial discrimination against prospective employees of interstate commercial carriers by air.

[fol. 534] d. The respondent had about 800 employees in Denver, Colorado; and about 95 of its 220 pilots were based in Denver, Colorado (Tr. p. 162).

e. The Congress of the United States when it passed the Enabling Act for the People of Colorado to form a Constitution and a State Government and to admit the State to the Union required that the Constitution of the State of Colorado "be republican in form, and make no distinction in civil or political rights on account of race or color, and not be repugnant to the Constitution of the United States and the principles of the declaration of independence * * * ." The Constitution of the State of Colorado, adopted March 14, 1876, in its Bill of Rights, Article II, affirmatively and expressly incorporated certain principles of the Declaration of Independence. The Declaration proclaims, "We hold these truths to be self-evident:— that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." Sec. 3 of Article II of the Colorado Bill of Rights declares: "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties, of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness."— Equal opportunity for all is insured, in part, by Section 26 prohibiting slavery and Section 27 giving alien residents the right to acquire, and dispose of property as native born citizens. Further the Constitution of the State of Colorado to abolish in one area the "distinction in civil or political rights on account of race or color" expressly prohibited in any public educational institution "any distinction or classification of pupils * * * on account of race or color. (Art. IX, Section 8)."

f. In fulfillment of the mandate from the Congress of the United States that the State of Colorado "make no distinction in civil or political rights on account of race or color" and to insure to all citizens of the United States,

seeking work in the State of Colorado, the civil right to engage in the common occupations of life, the Colorado Anti-Discrimination Act of 1957 was passed.

[fol. 535] To implement the requirements of the Enabling Act and to avoid any repugnance with the Constitution of the United States, the State of Colorado enacted the Colorado Anti-Discrimination Act of 1957 to insure equal protection of the laws for each person seeking to engage in the common occupations of life.

III. The Finding of Fact, Conclusions of Law and Orders of the Commission are Supported by the Evidence and the Law.

In answer to petitioner's Third Claim for Relief respondent states the Findings of Fact, Conclusions of Law and Orders of the Commission are supported by substantial evidence and the law. Respondent denies each and every allegation of paragraphs 1, 2, 3, and 4 except as hereinafter specifically and expressly admitted.

Substantial evidence supporting the Findings of Fact are:

a. The 28 May 1957 Application for Employment—Continental Air Lines of Stearns, Mark Thornton, as well as the one of 27 April 1957 of respondent Green required the racial identity of the applicant for appointment. (Tr. N.) Respondent Green's application showed he was then in the United States Air Force and expected to be discharged about 1 May 1957. Stearn's application showed he was in the Navy Air Force.

b. All applications submitted to the Commission required a photograph of the applicant, but no photograph was attached to any application submitted to the Commission. Although the testimony might support such a requirement for a hostess applicant, (Tr. p. 158) it shows no support for such a requirement of office personnel, reservations personnel, (Tr. p. 159) or those not "primarily facing the public." (Tr. p. 157)

c. The Employment Policy from the General Policy Manual Continental Air Lines, Inc. (Complainant's Exhibit 9) states in part:

"A. Employment Policy

Applicants for employment will be considered solely on the basis of fitness and ability for the work as determined by such factors as character, skill, intelligence, and physical qualifications.

[fol. 536] *C. Responsibility for Selection*

The Department Head or his designated representative will select from the applicants referred to him by the Employment Manager the individual best suited for the position."

Harold W. Bell, Jr. Vice President, Personnel, Continental Air Lines Inc., described a man qualified to be employed by his air line as a pilot as one "able to fly, fly well, fly safely, and be a good member of the employee group." (Tr. p. 175A).

At the time Kenneth C. Sorby, Personnel Director of Continental Air Lines Inc. wired respondent Green in New York to come to Denver for his interview and arranged free air transportation, Continental Air Lines Inc. did not know he was a negro. (Tr. p. 169, 220 and 50). About June 24, 1957, respondent Green and Bryant were tested in Denver for the job as pilot. Six pilots, including respondent Green and Mr. Bryant were found qualified. (Tr. p. 185, 186). Mr. Bell, Continental Air Line's Vice President, described Mr. Green as "a good person and a very pleasant chap. He conducted himself very well with us." (Tr. p. 168). Four of the six found to be qualified were ordered to report for the July 10, 1957 class. Mr. Bryant was ordered to report for the September class. (Tr. p. 178, 190). Bryant's qualifications as stated by Mr. Bell, compared equally favorably with Mr. Green's (Tr. p. 186). Mr. Bell also said that respondent Green's qualifications "were satisfactory." (Tr. p. 169, 170).

The Flight Time Qualification required of all pilots, according to the latest printed application form, (respondent's #2) is: "Minimum 2,000 hours (flight time must be substantiated by certified log or record.)"

Mr. Bell testified that the company's minimum requirements for a man to be accepted as a candidate for pilot training included 2,000 flight hours "with as much multi-engine as we can get." (Tr. p. 232). The multi-engine experience must be "over 100 hours" (Tr. p. 232).

Continental Air Lines Inc. had no objection to making the records of the six qualified applicants available to the Commission for its deliberation and to evaluate the six according to qualifications. (Tr. p. 235). The records were volunteered to be supplementary exhibits. (Tr. p. 236).

[fol. 537] Bryant's flight time was 1160 hours with only 5 hours multi-engine. One of the four had no multi-engine experience and only 1031 hours flying time. (Tr. M.)

Marlon D. Green had a total of 3,071:30 flying hours with multi-engine equipment.

Mr. Kenneth C. Sorby, Manager, Employment and Employee Relations, Continental Air Lines Inc., testified that it was his personal job (Tr. p. 225) to interview applicants, but only met Mr. Green at the airport cafeteria (Tr. p. 226). Applicants are usually interviewed in the Personnel Office 3½ miles from the airport. (Tr. p. 226 and 145.)

Of Mr. Green he said, "All you have to do, I think, is shake hands with this fellow and you realize you have a pretty good boy. He is very friendly. I have been impressed with him right along." (Tr. p. 230).

Mr. Bell as Vice President of Personnel, was responsible for collective bargaining (Tr. p. 165). He expressed his high regard for the Air Line Pilots Association and his opinion that this pilot's union "will be perfectly fair in this matter" of the colored pilot. (Tr. p. 163-165).

d. When questioned how the five out of the six qualified pilots were selected and yet Mr. Green was not selected, Mr. Bell (Tr. p. 207) said he didn't know exactly who made the decision. Mr. Sorby denied he made it. Mr. Bell then described the selection method as "quite informal"- "haphazard" (Tr. p. 207-212).

e. About July 8, 1957 H. W. Bell Jr. telegraphed to Marlon D. Green—"Regret you were not selected for next Co-pilot class." (Complainant's #7). Mr. Bell testified that, as the result of a newspaper story in the Albuquerque

Journal of August 4th (Tr. p. 154) Mr. Green's name was withdrawn from the eligibility file solely because of the publicity. (Tr. p. 187-188). Mr. Bell instructed Mr. Sorby, the Employment Manager, to eliminate Mr. Green's application (Tr. p. 224, 225).

There is no evidence that the newspaper story was on the front page. Mr. Bell, nonetheless, stated that Continental Air Lines Inc. had the feeling that a pilot because of his unique position should not be involved in public controversy. (Tr. p. 154).—Continental Air Lines Inc. was not [fol. 538] interested in pilots "who make the front page." (Tr. p. 155)—even though the pilot was conscientiously or rightly asserting his rights in any type of lawsuit that got publicity. (Tr. p. 190).

Further, some additional substantial evidence was suppressed by the objection (Tr. p. 94) of Continental Air Lines Inc. to the testimony of Roy M. Chapman and John I. Binkley relating to the attempted conciliation and negotiation after December 23, 1957, (Tr. p. 87 to 96). This excluded competent and material evidence contrary to the provisions of the Colorado Anti-Discrimination Act of 1957. It also deprived respondent Green of due process of law in violation of Article II, Sections 6 and 25 of the Colorado Constitution and the XIV Amendment of the Constitution of the United States.

Wherefore, if there is any lack of support in the evidence, respondent Green moves that the Commission's ruling on the objection be reversed and the proceedings be remanded to take all the evidence of Roy M. Chapman, John I. Binkley, Harold W. Bell, Jr. and Kenneth C. Sorby and to enter an order directing back pay.

3. The Commission's Conclusions of Law are not only supported by substantial evidence but are also in accord with the evidence and the law. However, the only error of law of the Commission was its depriving the respondent Green of due process of law, as set out above, when it excluded certain competent and material testimony of Roy M. Chapman, John I. Binkley, Harold W. Bell Jr., and Kenneth C. Sorby.

Wherefore, respondent Green moves the Court for an order and decree enforcing the Orders of the Commission, or in the alternative, if the Court finds the evidence insufficient then to remand the proceedings to the Commission with instructions to take additional evidence from Roy M. Chapman, John I. Binkley, Harold W. Bell Jr., and Kenneth C. Sorby and others relating to the excluded evidence.

IV. MARLON D. GREEN WANTS TO BE EMPLOYED BY
CONTINENTAL AIR LINES INC.

1. Marlon D. Green has revoked, and hereby revokes, his request to withdraw his complaint and has given the Commission written notice of his desire to enter the pilot training course to be conducted by respondent. He wants employment with petitioner.

[fol. 539] V. The Hearing was held at all times before the Chairman and at Least one Commissioner as Hearing Examiners.

In answer to petitioner's Fifth Claim for Relief it is admitted that by the Order dated March 28, 1958, the Commission docketed the complaint of respondent Green for hearing before the Commission sitting as hearing examiners.

Nevertheless no objection was made by petitioner, and it proceeded with the hearing when only five of the seven Commission members were present. It did not object when one Commissioner was absent on the afternoon of May 7, 1958 (Tr. p. 59). At the close of the day on May 7, when Commissioner Manzanares asked to be excused to serve as a pallbearer the next day, petitioner's counsel made no objection and indicated acquiescence. (Tr. p. 134-136). No objection was made at the opening of the proceedings on the morning of May 8, 1958 (Tr. p. 140 to 142) although motions on other matters were made and a continuance until other members were present could have been made. Objections not raised before the Commission can not be raised before this court. (Subsection (3) Section 7, Ch. 176, SL. 1957.)

The Chairman of the Commission and at least one other Commissioner were present during the taking of all the testimony, arguments and hearing.

Section 4 (5) of the statute specifically states that hearings may be held "by any Commissioner * * * or by any hearing examiner appointed by the Commission."

VI. The Findings of Fact, Conclusions of Law and Orders of the Commission are Understandable and Certain.

In answer to the Sixth Claim of Petitioner for Relief, respondent states that the Findings of Fact, Conclusions of Law and Orders of the Commission are understandable and certain.

However, in the alternative, if the proceeding is remanded to the Commission to take additional evidence, the Commission's Order should be amended to require not only hiring but also back pay to effectuate the purposes of the Act.

Address of Respondent, 608 North Logan Street, Lansing, Michigan.

[fol. 540] T. Raber Taylor, Attorney for Respondent,
Marlon D. Green, 405-818 Seventeenth Street, Denver 2, Colorado, ALpine 5-2051.

CERTIFICATE OF SERVICE

I certify that I have served the above Answer upon the petitioner, Continental Air Lines Inc. and the other respondents by placing true copies thereof in separate envelopes postage prepaid, in the United States mail at Denver, Colorado, addressed to their respective attorneys, namely, Holland & Hart, Equitable Building, Denver 2, Colorado, and Duke W. Dunbar, Attorney General, State Capitol Building, Denver 2, Colorado, on the 30th day of March 1959.

T. Raber Taylor.

[fol. 541]

[File endorsement omitted]

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. B-29648

CONTINENTAL AIR LINES, INC., Petitioner,

v.

COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, Commissioners of said Commission, and MARLON D. GREEN, Respondents.

REPLY—Filed April 30, 1959

Comes Now the above-named Petitioner by its attorneys and for its Reply to the Counterclaim of the above-named Respondents (save and except Respondent Marlon D. Green) states and shows the Court as follows:

First Defense

Petitioner moves the Court to dismiss the Counterclaim for failure to state a claim upon which relief may be granted against Petitioner.

Second Defense

1. Petitioner admits the allegations contained in ¶¶1, 2, 3, and 4 of the Counterclaim.

2. Petitioner admits that on or about January 7, 1959, notice of the election by Respondent Green to enroll in Petitioner's next pilot training course was served upon Petitioner, as alleged in ¶5. Petitioner denies each and [fol. 542] every other allegation contained in said ¶5 for lack of knowledge or information sufficient to form a belief as to the truth thereof.

3. Petitioner admits the allegations contained in ¶6 of the Counterclaim.

4. Petitioner denies the allegations contained in ¶7 of the Counterclaim and, on the contrary, alleges that these proceedings were commenced by Petitioner to review and set aside the Orders heretofore entered by Respondent Commission.

5. Petitioner admits that it has commenced this action in this Court seeking a review of the Orders made and entered by Respondent Commission as alleged in ¶8 of the Counterclaim. Petitioner denies each and every other allegation contained in said ¶8.

6. In answer to ¶9 of the Counterclaim, Petitioner states that it may or may not employ additional pilots or accept other persons for training as pilots depending upon a number of business factors wholly unrelated to the issues in this proceeding, including such factors as the fluctuation in demand for air service over Petitioner's routes, the granting of pending route applications and the sale of existing aircraft or the acquisition of additional aircraft. Petitioner denies the allegation that such action, if taken, would be detrimental to the rights of Respondent Green.

7. Petitioner denies the allegations and conclusions set forth in ¶10 of the Counterclaim.

Wherefore, Petitioner having fully replied to the Counter [fols. 543-546] claim, renews its prayer for relief as set forth in its Complaint and Petition for Review herein.

Holland & Hart, By Patrick M. Westfeldt, William C. McClearn, Warren L. Tomlinson, Attorneys for Petitioner, 520 Equitable Building, Denver 2, Colorado, AMherst 6.1461

[fol. 550] [File endorsement omitted]

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. B-29648

[Title omitted]

STIPULATION—Filed October 25, 1960

It is hereby stipulated and agreed by and between the parties hereto that during the period of time material to this action:

(a) Continental Air Lines, Inc. (hereinafter called "Continental") was engaged in business as a commercial carrier by air of passengers, freight, and United States mail pursuant to a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board. Continental is qualified to do business in the state of Colorado where its principal offices are located.

(b) Continental conducted its business in and between the states of Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois and California. By reason thereof Continental was engaged in interstate commerce among said states.

[fol. 551] (c) If the record herein were remanded to the Colorado Anti-Discrimination Commission, said Commission would find and conclude that Continental was engaged in interstate commerce and subject to the terms and provisions of the Colorado Anti-Discrimination Act of 1957 and that said Commission had jurisdiction to hear and determine the complaint of Marlon D. Green against Continental.

(d) The position of pilot or co-pilot with Continental for which Marlon D. Green applied actually involved interstate operations.

The foregoing stipulations are entered into by the Commission and the parties hereto with the understanding that

the stipulations shall be included in the prior certified record and have the same effect as though certified by the Colorado Anti-Discrimination Commission to the District Court in and for the City and County of Denver, State of Colorado.

Charles S. Thomas, Assistant Attorney General, Attorney for Colorado Anti-Discrimination Commission, 104 State Capitol Building;

T. Raber Taylor, Attorney for Marlon D. Green, Suite 625—818 17th Street Building, Denver 2, Colorado.

[fol. 552] Holland & Hart, By Patrick M. Westfeldt, William C. McClearn, Warren L. Tomlinson, Attorneys for Continental Air Lines, Inc., 500 Equitable Building, Denver 2, Colorado.

Approved: William A. Black, Judge.

[fol. 557]

[File endorsement omitted]

IN THE DISTRICT COURT

IN AND FOR THE CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. B-29648

CONTINENTAL AIR LINES, INC., Petitioner,

vs.

COLORADO ANTI-DISCRIMINATION COMMISSION, and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, Commissioners of said Commission, and MARLON D. GREEN, Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
JUDGMENT—January 7, 1961

This matter coming on for review of the proceedings and Order of the Colorado Anti-Discrimination Commission in

the matter of Marlon D. Green, Complainant, v. Continental Air Lines, Inc., Respondent, and the Court having reviewed the record, and having heard arguments of counsel, and having read the briefs of Mr. T. Raber Taylor, for Marlon D. Green, Complainant, Mr. Charles S. Thomas, for the Commission, and Messrs. Patrick M. Westfeldt, Mr. William C. McClearn, and Mr. Warren L. Tomlinson, of Holland & Hart, for Continental Air Lines, Inc.,

Doth find:

That the Complainant, Marlon D. Green, filed a complaint against Continental Airlines, Inc., on August 13, 1957, [fol. 558] alleging, in substance, as follows:

1. That Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a negro;
2. That Continental failed to notify him as to their acceptance or rejection of his application as an airplane pilot within 10 days, as promised; and
3. That Continental violated the Act because its forms contain at least two specifications prohibited by the Colorado Anti-Discrimination Act, viz.: attachment of photograph and requiring applicant to state his race.

The Commission, after a hearing, entered the following Order:

" . . .

The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957."

Continental Airlines appealed from the ruling on several grounds, which the Court will hereinafter review.

The Colorado Legislature, in 1937, enacted the following law:

"1953—C.S.A. 5-1-1: Short Title: This article is known and may be cited as "The Aeronautics Act of 1937."

"5-1-2: Navigation of Aircraft: The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be [fol. 559] prescribed by the United States government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

"5-1-3: License for Navigation: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States government shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

" * * *

"5-1-8: Interpretation: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics."

This Court must recognize that as early as 1937, the Colorado legislature recognized federal laws and regulations on the subject of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides:

" * * *

"(5) 'Employer' shall mean the state of Colorado or any political subdivision or board, commission, de-

partment, institution or school district thereof, and every other person employing six or more employees within the state; * * *

It will be thus seen, from the above provision, that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce.

[fol. 560] The evidence showed the Complainant, Green, received "an application blank" from Continental Airlines in San Francisco, at which time he was a citizen of Arkansas; he was interviewed in Denver; at the time he made a complaint, namely, August 13, 1957, he was a resident of the State of Michigan (folio 1), and he was not a licensed pilot under the federal law, nor under the Colorado Aeronautical Act, and did not become one until September 27, 1957 (folio 16), at which time he gave his residence as 734 South Smith Avenue, El Dorado, Arkansas.

It further appears that Green had filed complaints against United Airlines for unfair labor practices in the States of Washington, New York and the District of Columbia. In Michigan, he filed similar complaints against General Motors, Francis Aviation, and Abrams Aerial Survey Corporation. In Washington, D.C., Green filed similar complaints with the President's Committee on Government Contracts against Capital Airlines and the Air Division of General Motors.

This Court has not been advised of the disposition of these complaints; nor is it important that it has not been so advised.

Continental Airlines' first and second claims for relief, which attack the jurisdiction of the Commission and raise a constitutional issue, are directed to the same basic legal issue and may properly be considered together. The facts upon which this issue is predicated were the subject of a Court-approved stipulation between the parties and are as follows:

[fol. 561]. Continental is a commercial carrier by air, operating pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. It provides air transportation for passengers, freight and United States mail between the states of Colorado, Texas,

Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce and it was further agreed that the position with Continental for which Respondent, Green, applied involved interstate operations. At the time of the hearing before the Commission, Continental employed approximately 220 pilots, of whom 90 to 95 were based in Denver. The other pilots were stationed in Texas. Notwithstanding these facts, the Commission asserted jurisdiction to hear and determine Respondent Green's complaint against Continental.

The constitutional issue presented in this case is not whether the State of Colorado had the general authority, pursuant to its police power, to enact the Colorado Anti-Discrimination Act. The question is whether the Act may legally be applied to the interstate operations of Continental involved in this proceeding.

Continental maintains that the Act, as applied to it on the facts of this case, is unconstitutional and void under the provisions of Article 1, Section 8, Clause 3, of the United States Constitution, which reads as follows:

"The Congress shall have power . . . (Clause 3) To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes; * * *

[fol. 562] Continental further contends that the United States Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (both generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The applicable rules of law on the constitutional issues are:

(a) In those areas of interstate commerce which by their nature require uniformity of regulation by a single authority, the states are without power to act even though Congress has not legislated on the subject; and

(b) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are of peculiar local concern, whenever Congress does, by legislation, occupy the field, the states are thereafter without power to act.

In either (a) or (b) above, an attempt by a state to act is unconstitutional as a violation of the commerce clause of the United States Constitution and attempts of state agencies to apply such statutes are void and of no force and effect.

Congress has the power to regulate interstate commerce. *Article 1, Section 8, Clause 3, United States Constitution.* Early in the history of this country, the United States [fol. 563] Supreme Court held that the power of Congress to regulate interstate commerce was supreme and plenary. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23, 70 (1824). This rule has never been altered and is today fully applicable.

The power of the Congress over interstate commerce does not mean that the States are completely without power to legislate in that field. In another early case, the United States Supreme Court held that in the absence of federal legislation regulating a particular area of commerce, the States could legislate on matters of peculiar local concern if the impact on interstate commerce did not interfere with the operation of that commerce. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299, 13 L.Ed. 996 (1851). However, even when the Congress has not acted, States may not regulate matters which, because of their nature, require national uniform treatment. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945).

These rules were expressed as follows by the United States Supreme Court in the *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729 (1913):

"The grant in the Constitution of its own force, that is, without action by Congress, established the essential

immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their [fol. 564] regulation should be prescribed by a single authority. It has been repeatedly declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation." 33 S.Ct. at 740.

Although Congress has legislated extensively in the area of racial discrimination with reference to interstate air transportation and has thereby withdrawn this field from regulation by the several states, the Court will first consider whether racial discrimination by an interstate carrier is a subject which (a) must be free from diverse regulation by the several states and governed uniformly, if at all, by Congress, or (b) whether it is a matter of primarily local concern upon which the states can legislate until, but not after, Congress acts. The United States Supreme Court has clearly and directly ruled that this is a matter permitting only national action. Attempts by states either (a) to impose discrimination on account of race, or (b) prohibit such discrimination, have been held unconstitutional as applied to interstate carriers.

In *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547 (1877), the court had before it a Louisiana statute which prohibited discrimination in passenger accommodations within the state. The defendant, owner of a passenger steamship which traveled the Mississippi River between Louisiana and [fol. 565] Mississippi, had refused certain accommodations to a Negro and was sued by her. The Court concluded that the statute as applied to those engaged in the transportation of passengers among the States was unconstitutional. The Court said:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * *

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the River or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other side be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state

lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

[fol. 566] The soundness of *Hall v. DeCuir* was expressly reaffirmed by the United States Supreme Court in 1946. *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 (1946). Here a Virginia statute required segregation of white and colored passengers for both intra-state and interstate motor vehicle carriers. A Negro passenger making an interstate trip challenged the validity of the statute as a burden on interstate commerce. The Court found that the statute, as applied to interstate carriers, was unconstitutional. The Court reaffirmed the doctrine of *Hall v. DeCuir* in the following language:

"The factual situation set out in preceding paragraphs emphasizes the soundness of this court's early conclusion in *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 66 S.Ct. at 1057.

In conclusion, the Court said:

"It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid." 66 S.Ct. at 1058.

Mr. Justice Frankfurter, concurring in the Court's decision, stated:

"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, is controlling. Since it was decided nearly 70 years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the court."

"The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, whether such contradictory

and confusing State laws concern racial commingling or racial segregation." 66 S.Ct. at 1059.

[fol. 567] The rule first set forth in *Hall v. DeCuir* and reaffirmed in *Morgan v. Virginia*, namely, that state regulation of the racial policies of interstate carriers constitutes a burden on interstate commerce because this area demands a "single, uniform rule to promote and protect national travel" has been often approved and applied. For example, in *Chance v. Lambeth*, 186 F.2d 879 (4th Cir. 1951), the Court held a regulation which required segregation of interstate passengers on a railroad to be unconstitutional because it imposed a burden on interstate commerce. The Court said:

"In *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, the court held that a statute of Louisiana which required a carrier to give all persons traveling within the state upon public vehicles equal rights and privileges was an unconstitutional regulation of interstate commerce since otherwise each state would be at liberty to regulate the conduct of carriers while in its jurisdiction, resulting in great confusion and inconvenience and destroying the uniformity necessary to the operation of the carrier's business." 186 F.2d at 881.

Also following the rule of *Hall v. DeCuir* and *Morgan v. Virginia* are *Charles v. Norfolk & Western Railway Co.*, 188 F.2d 691 (7th Cir. 1951); *Whiteside v. Southern Bus Lines, Inc.*, 177 F.2d 949 (6th Cir. 1949); *William v. Carolina Coach Co.*, 111 F.Supp. 329 (E.D. Va. 1952), aff'd 207 F.2d 408 (4th Cir. 1953).

In *Pryce v. Swedish-American Lines*, 30 F.Supp. 371 (S.D. N.Y. 1939), plaintiff brought an action for damages against defendant shipline, alleging that it discriminated against her because of her color in violation of the New York civil rights law "while she was a passenger on defendant's vessel on a cruise from New York City to various South American ports and return." Defendant was a Swedish corporation and the vessel involved was under Swedish registry.

As one of two grounds for dismissing plaintiff's complaint, the Court said:

"There is, however, an even more compelling reason for refusing to apply Sections 40 and 41 of New York Civil Rights Law to the facts set forth in the second cause of action. To do so, would in effect be construing the statute as forbidding discrimination between passengers on the part of common carriers engaged in commerce between the port of New York and foreign ports. If construed in such a manner, the statute undoubtedly would illegally interfere with foreign commerce. See *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 30 F.Supp. at 372.

The *Pryce* case is a clear holding that to apply a state law forbidding racial discrimination to interstate or foreign commerce constitutes an unlawful interference with that commerce.

The important point is that the foregoing cases stand for the proposition that the question of racial discrimination by interstate carriers is, in and of itself, of such a nature that uniform regulation by a single authority is required. The burden on commerce lies in subjecting interstate carriers to the law-making powers of the legislatures in the several states through which such carriers move. The foregoing cases and others show the practical obstructions and burdens that result from such diversity of regulatory power. The diversity of this regulatory power is the burden on interstate commerce which is unconstitutional.

All of the states of the United States are sovereign within constitutional limits. What any particular state law is [fol. 569] today or what it may be tomorrow, and whether or not any one or more of such states have any laws on the subject is of no significance. If an interstate carrier is subject to the regulatory power of all of the states through which it passes, it is automatically subject to non-uniform regulation. Such non-uniform regulation is what the United States Supreme Court has held to be barred by the commerce clause.

Respondent, Green, relies principally upon two cases, which the Court will discuss.

In *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358 (1948), a conviction under a Michigan civil rights statute was upheld. Defendant had refused to permit a Negro on its excursion boat which traveled between Detroit, Michigan, and Bois Blanc Island, a small island in the Detroit River about 15 miles from Detroit. Bois Blanc Island, which was almost entirely owned in fee by defendant and was used by it as an amusement park, was technically across the international boundary in Canada. However, there was no access to the island from Canada or in any way other than on defendant's excursion boat. The opinion does not indicate that defendant held a certificate of public convenience and necessity from any federal agency. Based upon these facts it was held that defendant's conviction under the Michigan statute did not violate the commerce clause in the United States Constitution. But the Court carefully limited its holding to the unusual facts before it, saying, in part:

[fol. 570] "Of course, we must be watchful of state intrusion into intercourse between this country and one of its neighbors. But if any segment of foreign commerce can be said to have a special local interest, apart from the necessity of safeguarding the federal interest in such matters as immigration, customs and navigation, the transportation of appellant's patrons falls in that characterization. It would be hard to find a substantial business touching foreign soil of more highly local concern." 68 S.Ct. at 361-62.

In addition, the Court took pains to carefully distinguish the unique *Bob-Lo* situation from the doctrine established by the *Morgan* and *Hall* cases. It said:

"Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, supplemented by *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, 165 A.L.R. 574, and *Pryce v. Swedish*

American Lines, D.C., 30 F.Supp. 371, as flatly controlling this case. We need only say that no one of those decisions is comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties. None involved so completely and locally insulated a segment of foreign or interstate commerce. In none was the business affected merely an adjunct of a single locality or community as is the business here so largely. And in none was a complete exclusion from passage made. The Pryce case, of course, is not authority in this Court, and we express no opinion on the problem it presented. The regulation of traffic along the Mississippi River, such as the Hall case comprehended and of interstate motor carriage of passengers by common carriers like that in the Morgan case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here." 68 S.Ct. at 363-364.

It is thus quite clear that the U. S. Supreme Court did not intend to detract from nor diminish the doctrine of *Morgan* and *Hall*. It is equally apparent that the facts in the present case, involving frequent high-speed air transport [fol. 571] between eight states pursuant to certification from the Civil Aeronautics Board, are much more akin to the transportation involved in *Morgan* and *Hall* than to the highly local, non-commercial traffic with which *Bob-Lo* was concerned.

During oral argument before this Court, Respondent, Green, indicated primary reliance upon *Railway Mail Association v. Corsi*, 326 U.S. 88, 65 S.Ct. 1483 (1945). The *Corsi* case did not in any way involve the commerce clause of the U. S. Constitution. *Corsi*, interpreted most favorably to Respondents, only held neither the due process clause of the 14th Amendment, nor the equal protection clause, nor the clause conferring authority over postal matters

upon Congress prevented a state from adopting a civil rights statute. The application of such a statute to interstate commerce was neither raised nor discussed nor decided.

There is perhaps less permissible state regulation of interstate transportation than any other area of commerce. The characteristics of interstate transportation, namely, definite, regular and frequent contacts with numerous states, require that many aspects of interstate transportation be left free from state regulation. The speed and complexity of long-distance air transportation renders it even less susceptible to state regulation than the river boat travel involved in *Hall v. DeCuir*, or the motor vehicle transportation in *Morgan v. Virginia*.

The foregoing cases hold that the states may not regulate the racial policies of the interstate operations of carriers, [fol. 572] and they are consistent with a body of law regulating interstate commerce which has been developed and uniformly applied for nearly 150 years.

In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945), the Supreme Court declared unconstitutional the Arizona Train Limit Law which prescribed the maximum number of passenger and freight cars for trains operating in the state. The Court reiterated familiar rules when it said:

"But ever since *Gibbons v. Ogden*, 9 Wheat. 1, 6 L.Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." 65 S.Ct. at 1519.

In holding the law unconstitutional, the Court said:

"Enforcement of the law of Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance

with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." 65 S.Ct. at 1522.

The Court clearly recognized that the Arizona law would of necessity affect operations in other states when it said:

"The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and before leaving the regulating state." 65 S.Ct. at 1523.

[fol. 573] In *Southern Pacific Co. v. Marie Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), the Supreme Court held that New York Workmen's Compensation Laws could not be applied to stevedores working in the maritime industry. The Court drew a parallel between federal power over maritime matters and federal power over interstate transportation, referring to the latter in the following language:

"A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it is now firmly established. Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." 37 S.Ct. 529.

Many state attempts to regulate interstate transportation operations have been struck down by the United States

Supreme Court. A state statute requiring the use of a contour type of rear fender mudguard on interstate trucks conflicted with the commerce clause and was unconstitutional. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962 (1959). A state statute requiring interstate trains to greatly reduce their speed at grade crossings was found to be a burden on interstate commerce. *Seaboard Air Line Railway Co. v. Blackwell*, 244 U.S. 310, 37 S.Ct. 640 (1917). A state was without constitutional power to order a railroad to remove bridges over which its interstate trains passed even though the bridge removal was a part of the State's flood control program. *Kansas City [fol. 574] Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75, 34 S.Ct. 564 (1914). Burdensome intra-state stops by interstate trains cannot be demanded. *Herdon v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U.S. 135, 30 S.Ct. 633 (1910); *St. Louis-San Francisco Ry. Co. v. Public Service Commission*, 261 U.S. 369, 43 S.Ct. 380 (1923). A state may not require that interstate trains leave their scheduled stops on time. *Missouri, K. & T. Railway Co. v. Texas*, 245 U.S. 484, 38 S.Ct. 178 (1918). And a local ordinance regulating the maximum number of passengers per car and the minimum number of cars required for a street railway company operating between cities in two states was invalid. *South Covington and Cincinnati Street Railway Co. v. Covington*, 235 U.S. 537, 35 S.Ct. 158 (1915). In this case, the Court said:

"If Covington (a city in Kentucky) can regulate these matters, then certainly Cincinnati (in Ohio) can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall v. DeCuir*, 95 U.S. 485, 489, 24 L.Ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments.'" 35 S.Ct. at 161.

Thus, an unbroken line of United States Supreme Court cases over a period of nearly 150 years has established that

the national power over interstate commerce is supreme and plenary; that even when Congress has not acted the states will not be permitted to regulate this commerce in [fol. 575] areas in which a uniform rule is needed because diversity of regulatory power creates an unconstitutional burden, that the racial policies pertaining to the interstate operations of carriers is an area in which a uniform rule is needed and only Congress can legislate, and that this, among many other aspects of interstate transportation, must remain free from regulation by the states.

Congress has regulated the activity involved in this case and thereby pre-empted the field, leaving the state without authority to act. The applicable rules concerning pre-emption are set forth in *Kelly v. State of Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937):

"The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government . . .

"This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where states may act in the absence of federal action but where there has been federal action governing the same subject." 58 S.Ct. at 91.

The Court stated that the doctrine of pre-emption is not applicable where there is a direct conflict between state law and federal law. In such a case the federal law is the supreme law of the land. In addition, the Court in the *Kelly* [fol. 576] case pointed out that the pre-emption rule is inapplicable if the subject is one demanding uniformity of regulation.

By virtue of any one of several federal statutes and regulatory systems, an interstate air carrier is prohibited from racial discrimination. As to those employers, federal legislation pre-empts the field.

The Railway Labor Act prohibits racial discrimination. The Railway Labor Act (45 U.S.C.A., Sections 151, et seq.) (hereinafter referred to as the R.L.A.), which was extended to cover interstate air carriers by a 1936 amendment (45 U.S.C.A., Sections 181; et seq.), is a comprehensive federal statute prescribing the duties of interstate air carriers with respect to their employees. There is no specific, detailed section of the R.L.A. which specifically treats the matter of racial discrimination. However, the United States Supreme Court has considered the provisions of the R.L.A. and has clearly held that racial discrimination by employers subject thereto is forbidden.

The latest pronouncement by the Supreme Court on this point came in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). Petitioners were Negro railway employees who contended that the union had failed to represent them equally and in good faith and had failed to protect them from unjustified discharge and loss of seniority. The Court expressed its interpretation of the statute in clear terms in the opening words of its opinion:

"Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining [fol. 577] agent be compelled to represent them fairly. In a series of cases beginning with *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination." 78 S.Ct. at 100.

The Court went on to say:

"Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad, and that

the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act." 78 S.Ct. at 102.

In *Steele v. Louisville & Nashville RR.*, 323 U.S. 192, 65 S.Ct. 226 (1944), referred to above as the leading case in this field, the Court said:

"We think that the Railway Labor Act imposes upon the statutory representative of the craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates . . . We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of the craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

See also *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, 65 S.Ct. 235 (1944); *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, [fol. 578] 338 U.S. 232, 70 S.Ct. 14 (1949).

The scope of these holdings by the Supreme Court is made clear by *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S.Ct. 1022 (1952). Whereas in the *Steele* case the Negro petitioners had admittedly been members of the craft (locomotive firemen) but had not been members of the union (because membership was denied to them on account of race), in *Howard* "the colored employees had for many years been treated by the carriers and the

Brotherhood as a separate class for representation purposes and have in fact been represented by another union of their own choosing." 72 S.Ct. at 1025. However, it was alleged that the Brotherhood, under a threat of strike action, forced the employer to enter into a collective bargaining agreement which would have the inevitable result of abolishing the Negroes' jobs and replacing them with Brotherhood members. By this action the union was in effect forcing the employer, an interstate rail carrier, to discriminate against Negro porters in the tenure of their employment. This is exactly the same field of law covered by the Colorado Act. The U.S. Supreme Court brushed aside the plea to restrict its earlier holdings to instances of discrimination by the union against members of the class it represented with the following language:

"Since the Brotherhood has discriminated against 'train porters' instead of minority members of its own 'craft', it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the Steele case points [fol. 579] to a breach of statutory duty by this Brotherhood.

"As previously noted, these train porters are threatened with the loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the Steele case 'discriminations based on race alone are obviously irrelevant and invidious.'" 72 S. Ct. at 1025.

And finally the Court held that the employer as well as the union was subject to the duty and obligation to treat its employees without discrimination based on race by permanently enjoining the railroad as well as the union from using the contract or any other device to oust the Negro

porters from their jobs. This portion of the Court's opinion reads:

"On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." 72 S.Ct. at 1026.

It is, of course, not material that the public policy or objectives behind both the federal and the Colorado legislation are similar. As stated by Mr. Justice Holmes, speaking for the Court in *Charleston & Western Carolina Ry. v. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915):

"When Congress has taken the particular subject matter in hand, coincidence (of state regulation) is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 35 S.Ct. at 717. —

See also *Wabash Railway Co. v. Illinois*, 118 U.S. 557, 7 [fol. 580] S.Ct. 4 (1886), where a state's attempt to prevent discriminatory railway rates was struck down because it was a subject of "general and national character", even though federal regulation would not sanction discriminatory railway rates either.

In summary, the Supreme Court decisions over a number of years require nondiscriminatory representation by labor unions. In addition, the Supreme Court in the *Howard* case clearly held that the R.L.A. requires the same nondiscriminatory treatment by an interstate rail carrier employer with respect to its employees. Hence, the R.L.A., as interpreted by the United States Supreme Court, occupies the field of law relating to discrimination in matters of employment by interstate rail and air carriers.

Such pre-emption necessarily precludes any attempt by Colorado, as in the instant case, to extend its regulatory activities in the field to the interstate operations of an air carrier.

The Civil Aeronautics Act prohibits racial discrimination. Not only has the field of racial discrimination by interstate

air carriers been pre-empted by the R.L.A., but it is also covered by the Civil Aeronautics Act, hereinafter referred to as the C.A.A., 49 U.S.C.A. Sections 401, et seq. It should be noted that in 1958, the C.A.A. was repealed and replaced with a new statute known as the Federal Aviation Program Act, hereinafter referred to as the F.A.P.A., 49 U.S.C.A. (Supp.) Sections 1301, et seq. However, the effective date [fol. 581] of the F.A.P.A., insofar as it supersedes the earlier provisions of the C.A.A. applicable to this case, was not earlier than December 31, 1958. (See annotation following 49 U.S.C.A. (Supp.) Section 1301.) Respondent Green's complaint against Continental, which was filed with the Commission on or about August 13, 1957, referred to acts which allegedly occurred in June and July of 1957. As a consequence, the C.A.A. and not the F.A.P.A. was in effect during all times material to this action.

The Civil Aeronautics Act regulates practically every phase of an interstate air carrier's operations. The public policy of this act is set forth in the broadest terms. 49 U.S.C.A. Section 402. Extensive control is exercised over flight crew personnel. 49 U.S.C.A. Sections 551-560. Such employees are licensed or certified by the Civil Aeronautics Board, and that Board may under certain circumstances revoke or suspend certificates or licenses. The disciplinary power of the Board over flight crew personnel is very broad. For instance, the Civil Aeronautics Board has the power to suspend or revoke pilots' certificates for bad judgment even though the pilot violated no statute, rule or regulation. *Hard v. CAB*, 248 F.2d 761 (7th Cir. 1957); *Wilson v. CAB*, 244 F.2d 773 (D.C. App. 1957). The statute delegates extensive power to the Board, including the power to conduct investigations and issue orders, rules and regulations. 49 U.S.C.A. Section 425. Pursuant to that power, the Board regularly issues orders and has promulgated a large volume of rules and regulations touching practically [fol. 582] all phases of interstate air carriage. 14 Code Fed. Regs.

The "intensive and exclusive" control of the Federal Government over air commerce was discussed by the United States Supreme Court in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 64 S.Ct. 950 (1944). The following lan-

guage from the concurring opinion of Mr. Justice Jackson is particularly illuminating:

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection in the hands of federally certificated personnel and under an intricate system of federal commands." 64 S.Ct. at 956.

In *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F.Supp. 871 (E.D.N.Y. 1955), the Court had before it the specific contention that the federal statutes had pre-empted one aspect of air commerce. The Village of Cedarhurst, located near Idlewild Airport in New York, enacted an ordinance prohibiting air flights above the city at an altitude of less than 1,000 feet. In holding the Cedarhurst ordinance unconstitutional, the Court said:

"The plaintiffs' contention that the legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute pre-emption in that field is upheld. The States, including the Village of Cedarhurst, are thus precluded from enacting valid contrary or conflicting legislation." 132 F.Supp. at 881.

In *Fitzgerald v. Pan American World Airways*, 229 F.2d [fol. 583] 499 (2d Cir. 1956), the plaintiffs alleged that they were denied first-class passage on one of defendant's airplanes because of their race and that such conduct violated the Civil Aeronautics Act, 49 U.S.C.A. Section 484(b), which provided in part as follows:

"No air carrier . . . shall . . . subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The Court held that this section prohibited racial discrimination by interstate air carriers and that it created an actionable civil right for the vindication of which the person harmed could bring a federal court action. The Court said:

"Although we regard it as not controlling, we note also the following: *Congress sought uniformity in the practices of those subject to this Act.* It is by no means clear that, in all states and territories, the common-law rules would render unlawful racial differentiations in accord with the 'separate but equal doctrine,' whereas, in the light of recent Supreme Court decisions, we must construe Section 484(b) so that that doctrine will not apply." 229 F.2d at 502.

The language italicized in the last quoted portion of the *Fitzgerald* case shows that Congress considered uniformity in practices of interstate air carriers to be necessary. This is in effect both a legislative and judicial interpretation to the effect that uniform rather than diverse regulation is necessary.

The *Fitzgerald* case is also a clear holding that racial discrimination in interstate air commerce is prohibited by federal law. Although the case itself involved discrimination against a passenger, there can be no doubt that the same [fol. 584] rule would apply to discrimination in matters of employment. The statute condemns "unjust discrimination" against "any . . . person" by an air carrier. "Person" certainly includes employees. Moreover, a subsequent case approved the broad interpretation which was given to section 484(b) by the Court in the *Fitzgerald* case. Judge Lumbard, concurring in *Spirt v. Bechtel*, 232 F.2d 241 (2d Cir. 1956), made the following comments:

"The authorities cited by our dissenting colleague are not in point, it seems to me, because in those cases there was good reason to believe, and this court found, that Congress was enacting legislation for the benefit of a class. The court therefore concluded that the right of a member of the protected class to bring a

civil suit should flow from the legislation. A clear case of this is our recent decision in *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499. We were there concerned with 49 U.S.C.A. Sec. 484(b) which protects against unjust discrimination by air carriers. The plaintiffs were persons allegedly harmed by unjust discrimination and were clearly within a class which Congress sought to protect." 232 F. 2d at 250.

In interpreting the Interstate Commerce Act, which contains language practically identical to the portion of the C.A.A. discussed in the *Fitzgerald* case, the U. S. Supreme Court, in *Mitchell v. United States*, 313 U.S. 80, 61 S. Ct. 873 (1941), stated among other things, as follows:

"We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (Citations omitted.) Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act 'to subject any particular [fol. 585] person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U.S.C. Section 3, 49 U.S.C.A. Section 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers." 61 S. Ct. at 877.

There are other reasons why it can only be concluded that the federal aeronautics statutes prohibit racial dis-

crimination by interstate air carriers and therefore leave the states without authority to act in this field. The section setting forth the declaration of policy in the federal statute reads in material part as follows:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

• • •

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;" 49 U.S.C.A. Section 402.

If anything, this section, which sets forth the objectives which Congress sought to achieve by the Act, is even more specific than the section held in the *Fitzgerald* case to prohibit racial discrimination.

In addition, as noted earlier herein, the original Civil Aeronautics Act was repealed and re-enacted, with amendments, as the Federal Aviation Program Act. 49 U.S.C.A. [fol. 586] (Supp.) Sections 1301, et seq. The section held in the *Fitzgerald* case to prohibit racial discrimination by interstate air carriers (49 U.S.C.A. Section 484(b)) was re-enacted without one word being changed. 49 U.S.C.A. (Supp.) Section 1374(b). It is a well-known rule that when a legislative body enacts without change a statute which has been judicially construed, the legislature is deemed to have approved and adopted the construction placed upon that act by the courts.

The *Fitzgerald* case is in accord with other decisions construing similar language in the federal statutes regulating other modes of interstate transportation. In *National Association for Advancement of Colored People v. St. Louis-San Francisco Rwy. Co.*, ICC No. 31423, 1 Race Rel. Law Rep. 263 (1956), the Interstate Commerce Commission ruled that the statute under which it functions prohibited passenger segregation on interstate rail travel.

The Commission said:

"The complainants invoke our authority to prevent violations of section 3(1), which makes it unlawful for a rail carrier 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' The disadvantage to a traveler who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable."

See also *Keys v. Carolina Coach Co.*, ICC No. MC-C-1564, 1 Race Rel. Law Rep. 272 (1956), where the Commission ruled that racial discrimination in bus transportation was prohibited by the applicable federal statute. The statutory language involved in this case was exactly the same as that found in the C.A.A. and given the same construction in the *Fitzgerald* case.

[fol. 587] The comprehensive scope of federal legislation with respect to interstate air carriers is obvious. When the pervasiveness of federal regulation of the industry generally is considered in connection with the specific federal laws and regulations (and the cases interpreting those laws and regulations) prohibiting racial discrimination by interstate air carriers, there can be no doubt but that federal law has covered the subject matter involved herein and leaves no room for the application of Colorado Law.

Executive orders prohibit discrimination by Government contractors. This is yet another federal regulatory system which covers racial discrimination by Petitioner and others similarly situated. By Executive Order 10479, August 13, 1953, the President established the Government Contracts Committee. The purpose of the committee is to prevent persons contracting with the federal government from discriminating on account of "race, creed, color or national origin." The committee recommended, and the President ordered in Executive Order 10557, September 3, 1954, that the following clause be included in all contracts executed by the contracting agencies of the federal government:

"In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter [fol. 588] in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause."

As a certificated commercial carrier by air, Petitioner is obligated to and in fact does transport United States mail under contract with the United States Government. 49 U.S.C.A. Section 485(a), 49 U.S.C.A. (Supp.) Section 1375. Therefore, Continental remains constantly in the status of one contracting with the federal government and subject to the non-discrimination policy required of such contractors. Specifically, Continental is prohibited from discriminating against "any employee or applicant for employment" because of race "in connection with the performance of any work" under government contracts. Obviously, members of flight crews are engaged in the performance of work in connection with transporting the mail. Again, federal regulation occupies the field.

If federal law occupies a field, it does so exclusively and it is immaterial whether or not the federal power is exercised. Perhaps the outstanding example of this principle is *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598 (1957). The Court held in effect that where the matter of prevention of unfair labor practices affecting commerce had been occupied by the National Labor Relations Act, the occupation was exclusive and barred state action pursuant to state law, notwithstanding the fact that the NLRB had refused to act in the specific matter because of jurisdictional yardsticks established by it. The case is famous be-

cause the Court was fully aware of the so-called no man's land which existed where the federal government had jurisdiction [fol. 589] but refused to act and the state government could not act. Nevertheless, Federal law "pre-empted" the field and the state was powerless to act.

To the same effect is *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). The Court there held that state labor law could not enter fields which might arguably (though not definitely) be covered by the federal labor act. Several statements made by the Court indicate the breadth of the doctrine of pre-emption and the restrictions placed upon the extension of state law into areas covered by federal law:

"In the light of these principles, the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the State's jurisdiction is displaced.

• • •

"Even the States' salutary effort to redress private wrongs or grant compensation for past harms cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 79 S.Ct. at 780.

These recent United States Supreme Court decisions delineate the scope of the pre-emption doctrine. The Railway Labor Act, the Civil Aeronautics Act and the Executive Orders pertaining to Government Contractors all deal directly and forcefully with racial discrimination by interstate air carriers. Hence, Colorado's racial policies may not be extended to this area.

[fol. 590] In conclusion, the Court finds that the Colorado Act may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier.

Accordingly, the findings of the Colorado Anti-Discrimination Commission are set aside, and the Complaint of Mahlong D. Green is dismissed.

The Court orders that a Motion for a New Trial be dispensed with, and if filed, would be overruled.

Dated this 7th day of January, A.D. 1961.

By the Court:

William A. Black, District Judge.

[fol. 593] [File endorsement omitted]

IN THE DISTRICT COURT IN AND FOR
THE CITY AND COUNTY OF DENVER,
COLORADO

Civil Action No. B-29648

[Title omitted]

STIPULATION—Filed February 23, 1961

It is hereby stipulated and agreed by and between the parties hereto:

1. That the record in the Supreme Court of Colorado in case No. 19215, entitled "The Colorado Anti-Discrimination Commission, et al., Plaintiffs in Error, vs. Continental Air Lines, Inc., Defendant in Error," consisting of folios numbered 1 through 215, being the record in this cause upon a prior appeal to the Supreme Court of Colorado, be considered as a part of the record on error in the within cause.

2. That the record on error in this cause which begins with folio 216 relates to matters subsequent to the order in case No. 19215 whereby the Supreme Court heretofore remanded said cause to the District Court for further proceedings.

3. That the parties hereto orally stipulated on October 25, 1960, with Court approval, that if the Commission record had been remanded to the Commission the signature of each member of the Commission would have been added to the last page of the Commission's orders of December 19, 1958 and January 7, 1959.

Dated this 22nd day of February, 1961.

Duke W. Dunbar, Attorney General, Frank E. Hickey, Deputy Attorney General, Charles S. [fol. 594] Thomas, Assistant Attorney General, 104 State Capital, Denver 2, Colorado, Attorneys for Respondents.

T. Raber Taylor, 818-17th Street Bldg., Denver 2, Colorado, Attorney for Marlon D. Green.

Holland & Hart, By William C. McClearn, Equitable Building, Denver 2, Colorado, Attorneys for Petitioner.

The inclusion of the foregoing stipulation in the record of error in the above-captioned matter is hereby approved.

Dated at Denver, Colorado this 23rd day of February, 1961.

By the Court:

Neil Horan, District Judge.

[fol. 637]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19771

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission and MARLON D. GREEN, Plaintiffs in Error,

v.

CONTINENTAL AIR LINES, INC., Defendant in Error.

Error to the District Court
of the
City and County of Denver

Honorable William A. Black, Judge.

En Banc

Judgment Affirmed

Mr. Duke W. Dunbar, Attorney General, Mr. Frank E. Hickey, Deputy Attorney General, Mr. Charles S. Thomas, Assistant Attorney General, Attorneys for Plaintiff in Error, Anti-Discrimination Commission.

Mr. T. Raber Taylor, Attorney for Plaintiff in Error, Marlon D. Green.

Messrs. Holland & Hart, Mr. Patrick M. Westfeldt, Mr. William C. McClearn, Mr. Warren L. Tomlinson, Attorneys for Defendant in Error.

[fol. 638] Mr. Burke Marshall, Assistant Attorney General, Mr. Harold H. Green, Mr. David Rubin, Attorneys for the United States.

Mr. Arnold Forster of the New York Bar, General Counsel, Mr. Paul Hartman, of the New York Bar, Mr. Sol Rabkin, of the New York Bar, Associate Counsel, For the Anti-Defamation League of B'nai B'rith.

Mr. Edwin J. Lukas, of the New York Bar, General Counsel, Mr. Theodore Leskes, of the New York Bar, Associate Counsel, For the American Jewish Committee.

Messrs. Donaldson, Hoffman & Goldstein, Counsel for the Anti-Defamation League of B'nai B'rith.

Mr. Charles Rosenbaum, Counsel for the American Jewish Committee.

Mr. Mandel Berenbaum, Mr. Louis G. Isaacson, Mr. Joseph Mosko, Mr. James Radetsky, Mr. Stanton Rosenbaum, Mr. Walter M. Simon, Mr. Anthony F. Zarlengo, Mr. William S. Powers, Amici Curiae.

OPINION—February 13, 1962

Mr. Justice Moore delivered the opinion of the Court.

[fol. 639] Marlon D. Green filed a complaint before the Colorado Anti-Discrimination Commission in which he alleged that the Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a Negro. It was further alleged that Continental Airlines violated the said act in that its forms of application for employment as a pilot contain at least two specifications prohibited by the act, namely, attachment of a photograph and requiring the applicant to state his race.

After a hearing before the Commission it ordered that:

"The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957."

On review of the commission's order the district court held that the Colorado Anti-Discrimination Act, in so far as it purported to regulate the employment of flight crew personnel of an interstate air carrier, was invalid as creating a burden upon interstate commerce. The trial court entered a judgment ordering the dismissal of Green's com-

plaint before the commission. Green and the commission are here by writ of error seeking reversal of the judgment. [fol. 640] In 1937 the General Assembly enacted the following statutes—(now C.R.S. '53, 5-1-2, 5-1-3 and 5-1-8).

"5-1-2: NAVIGATION OF AIRCRAFT: The public safety requiring and the advantages of uniform regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be prescribed by the United States government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

"5-1-3: LICENSE FOR NAVIGATION: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States government shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

"5-1-8: INTERPRETATION: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics."

Thus, in 1937 the legislature gave recognition to federal laws and regulations in the realm of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides in C.R.S. '53, 80-24-2 (5) :

“‘Employer’ shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every [fol. 641] other person employing six or more employees within the state; * * *”

80-24-6 (2) provides that it shall be an unfair employment practice,

“For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry.”

Continental Airlines, among other defenses not necessary to consider, raises the question of whether the Anti-Discrimination Commission has any jurisdiction over the subject matter of the action.

It is admitted that Continental is a commercial carrier by air; that it operates pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. The company provides air transportation for passengers, freight, and United States mail between the states of Colorado, Texas, Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce, and it was further agreed that the particular employment sought by Green involved interstate operations.

[fol. 642] Continental contends that the Colorado statute under which these proceedings were instituted, as applied to the facts of this case, is unconstitutional and void under Article I, Sec. 8, clause 3 of the Constitution of the United States which provides :

“The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The trial court adjudged in effect that the Colorado Anti-Discrimination Act cannot constitutionally be extended to cover the hiring of flight crew personnel of an interstate air carrier; that if said Act be applied to the hiring contracts of interstate air carriers it would unconstitutionally burden interstate commerce and would amount to an invasion of a field pre-empted by the United States under (a) The Railroad Labor Act; (b) the Civil Aeronautics Act; and (c) Federal executive orders dealing with discrimination by employers contracting with the federal government. The trial court entered judgment setting aside the findings of the commission and dismissing Green's complaint.

[fol. 643] The United States and certain other groups interested in the subject matter of the controversy were granted leave to file briefs as amici curiae. In the brief filed by the Assistant Attorney General of the United States, argument is advanced under separate captions as follows:

"I. The Commission's assertion of jurisdiction here-in does not unconstitutionally burden commerce.

"II. Colorado is not precluded by federal legislative or executive action from applying its anti-discrimination policy to the hiring practices of interstate air carriers."

Counsel for Green, in substance, make the same argument on the question of whether the State of Colorado has jurisdiction to regulate the hiring practices of those engaged in interstate air transportation.

With reference to the above stated propositions Continental presents lengthy argument under the following captions:

"1. The Colorado Anti-Discrimination Act May Not Constitutionally be Applied to Flight Crew Personnel of an Interstate Air Carrier.

"A. Application of the Colorado Anti-Discrimination Act to the Facts of This Case is Unconstitutional as a Burden on Commerce.

"B. Acts of Congress have Pre-empted the Subject Matter of this Litigation, Thereby Precluding Action by the States."

[fol. 644] Although additional arguments on other matters are contained in the briefs, they were not determined in the trial court. The only question resolved was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground.

The first question to be resolved on this writ of error is whether the Colorado Anti-Discrimination Act may be applied to flight crew personnel of an interstate air carrier. If the question is answered in the negative other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution, are academic and of no materiality to the issue to be determined.

The trial court entered extensive Findings of Fact, Conclusions of Law and Judgment. As set forth in the appendix to the brief of Continental, this document consists of thirty-eight printed pages. It is very apparent that the learned trial judge gave careful consideration to the numerous decisions of the Supreme Court of the United States which bear upon the issue. Many of them are analysed in the judgment entered by the court. The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result.

[fol. 645] From the numerous opinions written by the United States Supreme Court dealing with the legality of state regulation of those engaged in interstate commerce, two basic propositions have been firmly established, to-wit:

(1) In those areas of interstate commerce which by their nature require uniformity of regulation by a single author-

ity, the states are without power to act even though Congress has not legislated on the subject; and

(2) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are in some substantial degree of local concern; once the Congress does legislate upon the subject, it pre-empts the field and the states are thereafter without power to act.

An attempt by the state to apply a statute imposing burdens or restrictions upon persons engaged in either of the foregoing areas of interstate commerce will be set aside and held for naught as contravening the plenary power of the Congress to regulate interstate commerce. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299, 13 L.Ed. 996; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515; *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729. This power in Congress is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat 1, 6 L.Ed. 23.

[fol. 646] Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States. Whatever our private notions may be on the subject, the opinions of the U.S. Supreme Court have established the rule.

In *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547 (1877), the court had before it a Louisiana statute which prohibited discrimination in passenger accommodations within the state. The defendant, owner of a passenger steamship which traveled the Mississippi River between Louisiana and Mississippi, had refused certain accommodations to a Negro and was sued by her. The court concluded that the statute as applied to those engaged in the transportation of passengers among the states was unconstitutional. The court said, *inter alia*:

"But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of

Congress. The statute now under consideration, in our opinion, occupies that position."

In *Morgan v. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, a statute of the State of Virginia required segregation of white and colored passengers for both intrastate and interstate motor vehicle carriers. An interstate passenger who was a Negro challenged the validity of the statute as placing a burden on interstate commerce. The court held that the statute as applied to interstate carriers was unconstitutional. *Hall v. DeCuir*, *supra*, was approved in the [fol. 647] following language:

"The factual situation set out in preceding paragraphs emphasizes the soundness of this court's early conclusion in *Hall v. DeCuir*."

Counsel seeking reversal of the judgment of the trial court attempt in various ways to discredit the opinion of *Hall v. DeCuir*. It is asserted in the brief filed by the United States as amicus curiae that *Hall v. DeCuir* was "handed down seventy-six years prior to *Brown v. Board of Education*, 247 U.S. 483"; that the case has "long been eroded and devitalized" and that it "has no vitality today." The Supreme Court of the United States has not so indicated. *Brown v. Board of Education*, *supra*, did not involve interstate commerce. As recently as 1960 *Hall v. DeCuir* was cited with approval in *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, in which the United States Supreme Court said: "But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hall v. DeCuir*, 95 U.S. 485."

Our attention is invited to the fact that the United States does not consider *Hall v. DeCuir*, to be "devitalized" in those matters in which application of the doctrine for which it is authority will promote a result sought by the government. On September 2, 1960, the United States appearing by counsel, who are on the brief in the instant case, filed a brief as amici curiae with the Supreme Court [fol. 648] of the United States in *Boynton v. Virginia*, 364 U.S. 454, in which we find the following:

"Thus, even in the absence of congressional action, the Commerce Clause, of its own force, requires invalidation of unreasonable state-imposed burdens on interstate commerce. See *Morgan v. Virginia*, 328, 373; *Hall v. DeCuir*, 95 U.S. 485. * * *

Thus it will be seen that counsel for the United States, appearing here as amicus curiae, attempts like the Roman god Janus to face both ways.

The State of Colorado either does or does not have power to legislate concerning racial discrimination by employers engaged in interstate commerce. The authority of the state does not come into existence in the event the exercise thereof will produce a result which may tend to promote a particular cause and then disappear or become impotent when the exercise thereof may lead to a different result. Jurisdiction to function does not depend upon what results will flow from the exercise of regulatory power.

The Supreme Court of the United States has clearly indicated that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a "need for national uniformity," and that the states are without jurisdiction to act in that area. *Morgan v. Virginia*, *supra*.

The judgment is affirmed.

Mr. Justice Frantz, Mr. Justice McWilliams and Mr. Justice Pringle dissent.

[fol. 649] MR. JUSTICE FRANTZ dissenting:

The overriding and cardinal purpose of this case is to ascertain the relation between federal and state authority based upon the fundamentals of the commerce clause (U.S. Const. Art. 1, § 8, cl. 3) and the equal protection mandate to the states contained in the 14th Amendment to the Federal Constitution. Is there an area of accommodation between nation and state in which the state may act affirmatively to see that no one is denied employment by reason of his "race, creed, color, national origin or ancestry," notwithstanding the employment will require travel over state lines?

The majority opinion believes that a valid reconciliation is not possible, and that the Colorado Anti-Discrimination Act of 1957 is ineffectual as to employment contracts of Continental Air Lines, Inc., an interstate commercial carrier by air. Since I do not share this belief, I voice a view at variance with the majority.

At least five reasons come to my mind which provoke dissent. There may be other cogent and perhaps more convincing reasons for opposing the majority opinion, but those which move me to disagree are, in my opinion, principles established in law and reason. Their application brings into proper perspective the interrelation of the two federal constitutional provisions already adverted to, and establishes the propriety of the Colorado act as it affects Continental's operations. *United States v. Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440.

[fol. 650] Before launching into a discussion of these reasons it would be well to keep in mind that the Colorado Anti-Discrimination Commission had made findings adverse to Continental, and that these findings are based upon evidence. And the Commission made the critical finding that the only reason that Green "was not selected for training school [was] because of his race." It is suggested that a better understanding of this controversy will be realized by reading the opinions in *Commission v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P. (2d) 83, to which the present matter is a sequel.

I would now enumerate my reasons for holding the Colorado act to be in harmony with the commerce clause.

1. A contract of employment is not commerce; it is not an intangible that enters into the stream of commerce just because the employee travels from state to state.
2. Conditions of employment, statutorily imposed, forbidding hiring on the basis of race, creed, color, national origin or ancestry are federally recognized as being properly within the sphere of state police power and in this connection inoffensive to the commerce clause.
3. It is a traditional concept of the federal government that an employment contract is ordinarily controlled by the law of the state where made, and reasonable regulations of the state regarding such contracts will be honored by the nation.

4. State laws prohibiting discrimination on the basis of race, creed, color, national origin or ancestry are in aid of commerce and not a burden on it, and hence sanctioned by [fol. 651] the federal government. 5. By enacting laws banning such discrimination the state merely implements and fulfills the interdictions of the 14th Amendment to the national Constitution, and exercises the power delegated thereunder to preserve the rights of citizens, required by the Federal Constitution, to be protected by the states.

1. A contract of employment of a pilot of an interstate carrier by air is not interstate commerce. Such contract per se does not move in commerce, although the employment thereunder requires operation of airplanes through several states. If Green had been hired, at once the employment relationship would have been established: Continental as employer and Green as employee would have become a fait accompli. Nothing could be a more localized activity; the creation of the contract arose within the state; its existence resulted from an activity wholly within the state.

True, that which Green would have done as a result of the established relationship would have been interstate commerce. Affording due regard to the distinction between the local matter of employment, and the activities of the employee thereafter as commerce, is not a strained and tenuous process. Federal courts have recognized that the mere fact that a domestic transaction generates a movement in interstate commerce is not sufficient to declare the transaction interstate commerce. *Jewel Tea Co. v. Williams* (10th Cir.) 118 F. (2d) 202.

Indeed, the federal courts sound warnings against encroachment on state competence. "If the power to regulate [fol. 652] interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature." *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297.

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not

be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

Although the present problem is one without past precedent, we are not without straws in the wind. The Supreme Court of the United States asked itself "whether a state law taxing occupations is invalid so far as applicable to the pursuit of the business of *hiring persons to labor outside the state limits*, because in conflict with the Federal Constitution," (Emphasis supplied.) *Williams v. Fears*, 179 U.S. 186, 21 S.Ct. 128, 45 L.Ed. 186.

Its answer has relevance to our problem:

" * * * These labor contracts *were not in themselves sub-* [fol. 653] *jects of traffic between the states*, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce." (Emphasis supplied.)

"[B]y the law of New York the creation of an agency is to be determined by the law of the place where the acts take place which are relied upon to create it." *Siegmán v. Meyer*, 100 F. (2d) 367. The question of agency "is to be determined by the law of New York, because the scope of an agent's authority depends upon the law of the place where the authority is conferred." Per Learned Hand in *Still v. Union Circulation*, 101 F. (2d) 11. The place where the contract of employment is made is controlling as to the law. *Moore v. Ill. Central R. Co.*, 136 F. (2d) 412; *Habbs v. Armour & Co.*, 270 F. (2d) 71; *Helper v. Corona Products*, 127 F. (2d) 612.

Contracts for advertising space in a national magazine, though involving publishing advertising and the mailing

and distribution of magazines outside the state, are "peculiarly local and distinct from . . . circulation whether or not that circulation be interstate commerce." *Western Live Stock v. Bureau of Internal Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823.

"That which in its consummation is not commerce does [fol. 654] not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustrations given by the court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state." *Federal Baseball Club v. National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898, 26 A.L.R. 357.

I would hold that the contract of hiring, as it established an employment relationship, would have been consummated in the State of Colorado and subject to the domestic laws of the state. The fact that Continental engaged itself to carry passengers by air through several states, and that Green would have been a part of the air flight personnel, would have been an incident of the contract of employment. Continental's engagement to carry passengers would have been interstate commerce. Green's contract would not have been an undertaking to carry A, B and C as passengers outside the state; his engagement would have been to work at a certain position for Continental.

2. A state enactment, having as its objective the prevention of contractual discrimination in employment emanating from prejudice or preference concerning race, religion, color, national origin or ancestry, is sanctioned as the proper exercise of the police power of the state, even though its effect in particular cases may result in an impact on interstate commerce. Where the law thus bears upon such commerce, the federal courts generally find no [fol. 655] invalidating encroachment on the national domain in commerce.

That statutory laws prohibiting discrimination on the basis of color, race, creed, national origin or ancestry in connection with certain relationships find validity in the

police power cannot be controverted. "The execution of this power and the enactment of laws pursuant to it are necessary to the well-being of the people of all civilized communities." *Bolden v. Grand Rapids Operating Corp.*, 239 Mich. 318, 14 N.W. 241, 53 A.L.R. 183. See "Employment Discrimination," 5 Race Relations Reporter 569 (1960).

Legislation directed against racial or religious discrimination is action "within the bounds of the police power." *New York State Commission v. Pelham Hall Apts.*, 170 N.Y.S. (2d) 750. It is declarative of the state's public policy against discrimination, *Application of Association for the Preservation of Freedom*, 188 N.Y.S. (2d) 885; and its purpose is the promotion "of the public good," *City of Chicago v. Corney*, 13 Ill. App. (2d) 396, 142 N.E. (2d) 160.

Legislative measures aimed against "discriminations in the areas of employment predicated upon prejudices and preferences arising out of race, religion, color or national origin" establish a public policy for the state concerning the relationship of employer and employee. *U.S. National Bank v. Snodgrass*, 202 Ore. 530, 275 P. (2d) 860, 50 A.L.R. (2d) 725.

Recognition of such legislation as the exercise of the state's police power has been accorded by the Supreme Court of the United States. "And certainly so far as the [fol. 656] Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states." *Distict of Columbia v. Thompson Co.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480. See *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 65 S.Ct. 1483, 89 L.Ed. 2072; *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455.

Conditions of employment between one operating in interstate commerce and an employee, fixed by the state under its police power, have been the subject of attack in the federal courts. Thus, in *Smith v. Alabama*, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed. 508, a statute of Alabama was claimed to be in violation of the Federal Constitution. The statute made it a misdemeanor for an engineer to operate, in the state, a train of cars used for the transportation of persons

or freight without first undergoing an examination and obtaining a license from a board appointed by the Governor. The examination involved the character and habits of the applicant. Provision was made for denial or revocation of a license upon certain contingencies appearing.

Smith v. Alabama concerned an engineer whose ordinary run was over the Mobile and Ohio Railroad Company's road between Mobile, Alabama and Corinth, Mississippi. He never handled the engine between points wholly within Alabama. He also operated an engine pulling a passenger train between St. Louis and Mobile. It was contended that the statute contravened the commerce clause of the Federal [fol. 657] Constitution.

In disposing of the contention the Supreme Court said:

"In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

A statute of Alabama provided for the protection of the travelling public against accidents resulting from color-blindness and defective vision of railroad employees, and to that end required an examination before a state board of any person seeking a position that involved the running [fol. 658] or management of a railroad train. Its validity was questioned on the theory that it interfered with inter-

state commerce in the case of *Nashville, C. & St. L. Ry. v. Alabama*, 128 U.S. 96, 9 S.Ct. 28, 32 L.Ed. 352.

The railway company operated its lines through several states and had as a train conductor one who had not secured a certificate of his fitness in compliance with the Alabama statute. After reaffirming the doctrine enunciated in *Smith v. Alabama*, *supra*, the Supreme Court stated that "[s]uch legislation is not directed against commerce; and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

A state statute prescribing a not unreasonable number for the crews of freight trains "is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted in aid, not in obstruction, of such commerce and for the protection of those engaged in such commerce." (Emphasis supplied.) *Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290. See *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010.

A state may prescribe regulations for the payment of wages of employees of railway carriers, and so far as such law "affects interstate commerce, it does so indirectly." *Erie R. Co. v. Williams*, 233 U.S. 685, 34 S.Ct. 761, 58 L.Ed. [fol. 659] 1155, 51 L.R.A.N.S. 1097. A California statute required every "transportation agent" to obtain a license assuring his fitness and to file a bond securing faithful performance of the transportation contracts which he negotiated. Its apparent purpose was to protect the public from fraud and overreaching. In *California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, the court held the regulation not to be violative of the commerce clause, saying:

"As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised

its power, even though the regulation affects interstate commerce. Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress."

These decisions evidence the solicitude of the Supreme Court for sustaining the police power of the states in matters relating to certain kinds of contracts, and in particular employment relationships, even though the exercise of such power affects interstate commerce. Citation of these authorities does not pretend to be exhaustive, but it represents a good sampling from which we can deduce validity of the act here under attack. See *Colorado Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

3. Employment contracts are ordinarily of local concern, and controlled by the laws of the state where made. That they have relation to commerce among the states does not necessarily make them vulnerable to attack as being made pursuant to state laws which affect commerce. Legislation regarding contracts, aimed at regulation of rights, duties and liabilities of the contracting parties, is properly within the sphere of state activity, and even though it affects commerce, such impact is deemed indirect and hence valid. Should the federal government clearly preempt the area in which the state has acted, then exclusion of state action takes place.

Early in its history the Supreme Court of the United States stated that generally "the legislation of a State, *not directed against commerce* or any of its regulations, but relating to the *rights, duties, and liabilities of citizens*, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." (Emphasis supplied.) *Sherlock v. Alling, Adm.*, 93 U.S. 99, 23 L.Ed. 19.

The doctrine of *Sherlock v. Alling* has been applied in later cases decided by the federal appellate courts. A resort [fol. 661] to Shepard's United States Citations reveals its durability. And the doctrine has been applied to statutes of a state which impose conditions in order to effectuate an employment relationship. *Smith v. Alabama*, *supra*; *Nashville, C. & St. L. Ry. v. Alabama*, *supra*; *Chicago, R.I. & Pac. Ry. v. Arkansas*, *supra*. See *Richmond & Allegheny R.R. v. Tobacco Co.*, 169 U.S. 311, 18 S.Ct. 335, 42 L.Ed. 759; *Chicago, M. & St.P. Ry. v. Solan*, 169 U.S. 133, 18 S.Ct. 289, 42 L.Ed. 688. Last approved in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed. (2d) 852.

In *Smith v. Alabama*, *supra*, the court was dealing with state required examination and licensing of locomotive engineers. In holding the state legislation valid and inoffensive to the commerce clause, the court expressly made applicable the above language quoted from *Sherlock v. Alling*, *supra*. The sanction of the opinion extended to "regulating the *relative rights and duties* of persons within the jurisdiction of the State, and *operating on them*, even when engaged in the business of interstate commerce." (Emphasis supplied.)

Rights and duties settled by contract afford grounds for state intervention where the state can with propriety establish a public policy regarding them. Particularly is this true in relation to employment contracts—indeed, this has been a fertile field in recent years for the ordination of policy measures. Here personal relations are fundamental, and the greater the skill required of the employee, the greater is the personal element involved.

[fol. 662] A contract is a juridically recognized engagement between persons by which their rights and duties concerning a subject matter are established. *Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629. Ordinarily, juridical recognition is a matter of domestic concern. And, as already noted, the policy of the state may be exerted to require certain conditions in making the engagement before it shall have a binding effect upon the parties.

Rights and duties imposed by the parties upon themselves by agreement are pivotal concepts; to the Supreme Court they have significance in determining whether a matter presented to it indicates an intrusion on commerce. If legislation of the state is patently and essentially concerned with the rights and duties of persons, inter se, and said legislation in particular cases has an incidental or adventitious impingement on commerce among the states, the Supreme Court seems inclined to hold it related to a localized activity, and its influence on commerce not measurably significant.

All the elements necessary to the application of this doctrine are here present. Green is a qualified applicant for a position requiring special skills. A contract between Continental and Green would involve these skills, and hence the personal element creating a special, individual-to-individual relationship with rights and duties pervading it. The generality of the anti-discrimination law, evidently directed to employment generally, without intent to burden commerce, when brought into perspective with the immediate problem of hiring a person with special skills, leaves us with a law innoxious to interstate commerce.

4. The Colorado Anti-Discrimination Act is in aid of, and not a burden on, commerce. States may not deny persons within their jurisdictions the equal protection of the laws. U.S. Const., XIV Amend. May that which the states are prohibited from doing become the subject of harmonious, positive legislation by the states? May the states provide for equal treatment of persons within their jurisdictions by legislation? If they may, does the fact that commerce may be incidentally affected, invalidate such legislation?

"The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from *unfriendly legislation* against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race." (Emphasis supplied.) *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed.

664. It would appear that *friendly legislation* is implicitly invited.

State laws having local aspects "are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be [fol. 664] regarded as *legislation in aid of commerce*, and as a rightful exercise of the police power of the State to *regulate the relative rights and duties of all persons and corporations within its limits.*" (Emphasis supplied.) *Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 24 S.Ct. 132, 46 L.Ed. 268. *Richmond & Allegheny R.R. v. Tobacco Co.*, *supra*; *Chicago, M. & St.P. Ry. v. Solan*, *supra*; *Mobile County v. Kimball*, 102 U.S. 691, 26 L.Ed. 238.

So long as the federal government has not made clear its intent to act exclusively in the regulation of an area of commerce, the nation and the state may march hand in hand concerning it in advancing parallel policies against discrimination based on race, creed or color, *Bob-lo Excursion Co. v. Michigan*, *supra*. In a footnote of the opinion the court says, "The direction of national policy is clearly in accord with Michigan policy."

5. Colorado has activated the prohibitions of the Federal 14th Amendment by enacting a law forbidding discrimination in employment based on race, creed, color, national origin or ancestry. Under the 14th Amendment a person has a *federal right* not to be discriminated against by the state on the basis of race, color, creed or national origin; under the Colorado statute the state creates a similar right running against such discrimination by anyone, including a private party. What was a federal right thus becomes a broadened state right by virtue of the statute. See Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Quar. 375.

[fol. 665] The 14th Amendment is directed against discriminatory state action; the Colorado Anti-Discrimination Act is state action, but consistent with, although having a broader base than, the 14th Amendment. See *Bob-lo Excursion Co. v. Michigan*, *supra*. *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718, 21 Am.S.R. 576, 9 L.R.A. 589, indicates

that state laws putting "the colored citizen upon an equal footing in all respects with the white citizen" is nothing more than the declaration by the states of what the Federal Constitution ordains.

Contention was made in *Railway Mail Ass'n v. Corsi, supra*, that the New York Civil Rights Law offended the due process clause of the 14th Amendment. It seems to me that the answer of the Supreme Court is a manifestation of a view which would hold the Colorado act valid, as making effectual by state action in an affirmative way the 14th Amendment. The court said:

" * * * We have here a prohibition of discrimination in membership or union services on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection [fol. 666] of the state, which holds itself out to represent the general business needs of employees."

Since it is seriously doubted whether the federal government has assumed exclusive control of the employment in question, we should heed these words in the decision of *Railway Mail Ass'n v. Corsi, supra*:

"This provision can hardly be deemed to indicate an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees. *Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless.*" (Emphasis supplied.)

No such clear manifestation appears in this case.

° In the course of this opinion I have accepted as fact that the Anti-Discrimination Act will on occasion exert

an influence on commerce among the states. The act was designed to accomplish a purpose wholly within the letter and spirit of the 14th Amendment, and contains no exception as to employment involving duties requiring movement between states. In this respect interstate commerce will be affected, but not detrimentally. How can it be contended that state action which is obedient to the 14th Amendment does anything other than aid commerce?

Had the federal government clearly acted against discrimination in manner showing that preemption had taken place, the state would have no authority to act. But, as Justice Doyle demonstrated in his specially concurring opinion in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, *supra*, no federal preemption has been effected.

Mr. Justice McWilliams authorizes me to say that he concurs in this dissent.

[fol. 668] MR. JUSTICE PRINGLE dissenting:

The majority does not hold that the Anti-Discrimination Act itself is unconstitutional but only that it cannot apply to employers engaged in interstate commerce, and relies heavily on *Hall v. DeCuir*, 95 U.S. 485, 24 L.Ed. 547 (1877), to support its position. I agree that if *Hall v. DeCuir*, *supra*, is to be placed in limbo it can be done only by the hand which promulgated it—the Supreme Court of the United States.

However, I cannot believe that a law passed by a state which implements a basic concept of our form of government—the right of a man, otherwise well qualified, not to be denied a job solely because of his race, color or creed—can be deemed to be a *burden* on interstate commerce.

Moreover, I would point out that, in my opinion, the Colorado Anti-Discrimination statute cannot affect the uniformity of regulation in interstate commerce, for if any state passed a law permitting or requiring the discrimination complained of here, it would certainly be struck down as a violation of the Fourteenth Amendment to the Constitution of the United States. *Brown v. Board of Education*, 347 U.S. 483.

[fol. 669]

IN THE SUPREME COURT OF THE STATE OF COLORADO

19771

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENF MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission and MARLON D. GREEN, Plaintiffs in Error,

vs.

CONTINENTAL AIR LINES, INC., Defendant in Error.

JUDGMENT—February 13, 1962

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

By the Court. En Banc. February 13, 1962.

[fol. 670]

[File endorsement omitted]

[fol. 671]

IN THE SUPREME COURT OF THE STATE OF COLORADO
Civil Action No: 19771

[Title omitted]

PETITION FOR REHEARING—Filed February 21, 1962

The Plaintiff in Error, the Colorado Anti-Discrimination Commission petitions the Court for rehearing and for a clarification of the grounds on which the majority opinion is based. In support thereof it asserts that the Honorable majority of the Justices in rendering their decision misapprehended the following point:

The opinion at Page 5, construed the language of the Colorado Anti-Discrimination Act, 80-24-2 (5) C.R.S. '53 Supp. This language negatives the idea that there was any attempt on the part of the Legislature to legislate upon a matter involving interstate commerce. If this be the reason for affirming the lower Court's judgment, the remaining 8 pages of the majority opinion are only dictum and the dissenting opinions were differing on a constitutional issue when the majority had construed the statute so as not to bring it in conflict with the Federal Constitution or an Act of Congress, *A.F. of L. v. Reilly*, 113 Colo. '90, 155 Pac. 2d 145 and *Lipsett v. Davis*, 119 Colo. 335, 203 Pac. 2d 730.

[fol. 672] The uncertainty in the majority opinion raises the question whether the decision affirming is based on the construction of the State Statute, or the constitutional doctrine of Federal pre-emption. If the majority affirmed because the Legislature did not attempt "to legislate upon a matter involving inter-state commerce" there is no Federal question for consideration by the United States Supreme Court, 28 U.S. Code 1652,

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

"It should be emphasized that in respect to the construction of state statutes, the state Court's views are completely nonreviewable by the Supreme Court. If the sole basis of the decision is one of construction, the case cannot be the subject of either appeal or certiorari." Supreme Court practice-revised rules, Second Edition Stern and Gressman, Page 58.

The Colorado Anti-Discrimination Act is patterned after the New York Law, Page 71 of Green's Brief in Case No. 19215. In adopting the laws of another jurisdiction the general rule is that the Legislature adopts also the construction given these laws by the Courts of that jurisdiction and our Legislature is presumed to have done so in these instances, *Stebbins v. Anthony*, 5 Colo. 348, page 356. Hiring, which takes place within the state is covered, even if the employees work will be outside the state, thus in New York, S.C.A.D. took jurisdiction over an Ohio company which hired within the state of New York for employment in Caracas, Venezuela. The New York commission has also taken jurisdiction over an airline which did its formal hiring out of the state, because it drew all of its applicants from a school in New York, *Banks v. Capital Airlines*, 5 [fol. 673] Race Rel. L. Rep. 263. *Right To Equal Treatment—Administrative Enforcement Of Anti-Discrimination Legislation*, 74 Harvard L. Rev. 526, Page 566.

Continental in its Brief, Pages 6 through 21, impliedly conceded that the Colorado Anti-Discrimination Act was, by the Legislature, intended to apply to interstate air carriers.

Respectfully submitted,

Duke W. Dunbar, Attorney General, State Capitol,
Denver 2, Colorado; Frank E. Hickey, Deputy Attorney General, State Capitol, Denver 2, Colorado;
Charles S. Thomas, Special Assistant Attorney General, Attorneys for the Anti-Discrimination Commission, 1430 First National Bank Building,
Denver 2, Colorado, AM 6-0867.

[fol. 675]

[File endorsement omitted]

[fol. 676]

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 19771

[Title omitted]

PETITION FOR REHEARING OF MARLON D. GREEN, PLAINTIFF IN
ERROR—Filed February 28, 1962

Marlon D. Green, one of the plaintiffs in error, petitions for rehearing of the *en banc* four to three decision entered February 13, 1962. References to the record of proceedings before the Commission and to the record before the Court will be by the same designations as in the Briefs. The points claimed to be overlooked or misapprehended by the Court are as follows:

Facts Overlooked:

The Court has overlooked an important point of Marlon D. Green's position. On Page 7 of this opinion the majority of the Court says: "Counsel for Green in substance make the same argument on the question of whether the State of Colorado had jurisdiction to regulate the hiring practices of those engaged in interstate air transportation." The Court has overlooked the fact that the Congress of the United States by the 1875 Enabling Act for the State of Colorado gave Colorado jurisdiction over racial discrimination. Marlon D. Green's Brief in Case No. 19215, Page 35 through 42 and Pages 47 to 57.

The Answer of Marlon D. Green filed in the District Court made it clear that the Congress of the United States gave jurisdiction to the State of Colorado over racial discrimination (Folios 68 to 72).

T. Raber Taylor, Attorney for Plaintiff in Error,
Marlon D. Green, Suite 625, 818—17th Street,
Denver 2, Colorado, AL 5-2051.

[fol. 678]

IN THE SUPREME COURT OF THE STATE OF COLORADO

[Title omitted]

ORDER DENYING PETITIONS FOR REHEARING—March 5, 1962

The court having considered the petitions of plaintiffs in error for rehearing in said cause, and now being sufficiently advised in the premises, it is this day ordered that said petitions be, and the same hereby are, denied.

By the Court. En Banc/ March 5, 1962.

[fol. 680] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 681]

SUPREME COURT OF THE UNITED STATES

No. 146, October Term, 1962

THE COLORADO ANTI-DISCRIMINATION COMMISSION et al.,
Petitioners,

vs.

CONTINENTAL AIR LINES, INC.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted. The case is consolidated with No. 492 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration or decision of this petition.

[fol. 682]

SUPREME COURT OF THE UNITED STATES

No. 68 Misc., October Term, 1962

MARLON D. GREEN, Petitioner,

vs.

CONTINENTAL AIR LINES, INC.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND GRANTING PETITION FOR WRIT OF
CERTIORARI—October 8, 1962

On Petition for Writ of Certiorari to the Supreme Court of the State of Colorado.

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 492. The case is consolidated with No. 146 and a total of two hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 8, 1962.

Mr. Justice Goldberg took no part in the consideration or decision of this motion and petition.

[fol. 683]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 492

Consolidated with No. 146

MARLON D. GREEN, Petitioner,

against

CONTINENTAL AIR LINES, Inc., Respondent.

STIPULATION TO USE RECORD IN NO. 146 AS RECORD IN NO. 492
—Filed October 26, 1962.

On October 8, 1962, the Supreme Court of the United States granted certiorari in *Green v. Continental Air Lines, Inc.*, formerly No. 68 Misc., and now Case No. 492, and consolidated that case with *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, Case No. 146.

It is stipulated and agreed by and between counsel for Petitioner, Marlon D. Green, and counsel for Respondent, Continental Air Lines, Inc. that the printed record as designated and cross-designated in keeping with Rule 17 in the case of *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, No. 146, shall also be the record in case No. 492, and that the Clerk of the Supreme Court of the United States may, at public expense, order the appropriate number of additional copies of that [fol. 684] printed record for the use of Petitioner, Marlon D. Green, in connection with Case No. 492.

Dated at Denver, Colorado this 19th day of October, 1962.

T. Raber Taylor, Attorney for Petitioner, Marlon D. Green, 625 American National Bank Bldg., Denver 2, Colorado, ALpine 5-2051.

Patrick M. Westfeldt, William C. McClearn, Warren L. Tomlinson, John Carroll Richardson, Attorneys for Respondent, Continental Air Lines, Inc., 500 Equitable Building, Denver 2, Colorado, AMherst 6-1461.

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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1961

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,
PETITIONERS,

vs.

CONTINENTAL AIR LINES, INC., RESPONDENTS.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO**

DUKE W. DUNBAR,
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission,
PETITIONERS,

vs.

CONTINENTAL AIR LINES, INC., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

I. INTRODUCTION

COME NOW the petitioners, by their attorney, Duke W. Dunbar, Attorney General, State of Colorado and Floyd B. Engeman, Assistant Attorney General, State of Colorado, and petition the Court for the issuance of a Writ of Certiorari to review a judgment of the Supreme Court of the State of Colorado, being the court of last resort in the State of Colorado, in the case of *The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, No. 19771.

II. REFERENCE TO OPINIONS BELOW

The opinion sought to be reviewed is reported as *The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, 368 P. (2d) 970, which opinion is not as yet reported in the official reports of the Colorado Supreme Court, but is attached hereto as Appendix A. The opinion was first entered on February 23, 1962. Thereafter a petition for rehearing was filed. As a result the original opinion was modified, and as modified was adhered to on March 5, 1962. The petition for rehearing was denied and remittur issued on this same day.

III. GROUNDS FOR JURISDICTION

The statutory provision relied upon as conferring jurisdiction on this Court to review the judgment or decree in question by Writ of Certiorari is 62 Stat. 929, 28 U.S.C. 1257(3).

IV. QUESTION PRESENTED FOR REVIEW

The question presented for review is as follows:

Does a state statute which prohibits discrimination based on race in the hiring practices of an interstate air carrier conflict with the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States by being an undue burden on interstate commerce and prohibited by the preemption of this field by the laws of the United States?

V. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

“Powers of Congress — The Congress shall have power: (3) To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”

B. Section 4 of the Enabling Act of the State of Colorado reads as follows: (18 Stat. 474, 1 Colo. Revised Statutes 1953, 237, at 238)

“ * * * : Provided, That the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence;”

C. The Colorado Anti-Discrimination Act of 1957 reads in applicable part as follows:

“80-24-2 Definitions

(5) “Employer” shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof and every other person employing six or more employees within the state: * * *.”

“80-24-6. Discriminatory and unfair employment practices. —

(2) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in

the matters of compensation against any person otherwise qualified, because of race, creed, color, national origin or ancestry."

These statutory provisions are found in the Colorado Revised Statutes of 1953, Vol. 8, Permanent Supplement, at pp. 1008 and 1010, thereof.

VI. STATEMENT OF THE CASE

(References are to page numbers of the consolidated record.)

This case involves Marlon D. Green, a U. S. Air Force pilot officer with the rank of Captain, who sought employment as a Commercial air-line pilot. While stationed in Japan with the Air Force, he sent letters of application to most of the main air-lines in the United States, but with no success. On April 27, 1957, on his return from Japan, he secured an employment application form from the San Francisco office of the respondent, Continental Air Lines, Inc. (hereinafter referred to as "Continental"). This was sent to the Denver office of Continental for consideration for employment as a pilot. It was received April 30, 1957 (p. 224 and 225). Within three weeks Continental advised Mr. Green they were not hiring pilots at that time but that his application would be kept on file for future consideration (p. 225).

In June 1957, Continental began recruiting for some fourteen or fifteen pilots. It asked Green to come to Denver for an employment interview not knowing he was a negro (p. 226, 227, and 433). Green arrived in Denver on June 24, 1957. The next morning he reported to Con-

Continental's office at Stapleton Air-Port. Shortly thereafter at the direction of Captain Cramp, Assistant Chief Pilot for Continental, Green took a link trainer and flight test (p. 231, 232, and 235-239). Green and five others were all considered at about the same time for employment as pilots by respondent. They were all found to be qualified according to the standards prescribed by Continental (p. 360). Of the six, Green had by far the most previous flying experience as shown by the following table:

	Total Hours	First Pilot	Co- Pilot	Multi Engine	
Green	3071:30	1838:15	778:45	2900:00	(p. 490, 310)
George	2100:53	1145:35	874:13	897:23	(p. 474, 494)
Stearns	1200:00	750:00	450:00	934:00	(p. 478, 493)
Bryant	1150:00	1160:00	--	5:00*	(p. 486, 495)
Dresser	1031:00	916:00	--	--	(p. 482, 496)
Cole	1000:00	900:00	100:00	200:00	(p. 470, 497)

* Acquired between June 25, 1957, when Green and Bryant were examined and July 1, 1957.

Mr. Harold W. Bell, Vice-President Personnel, Continental Air Lines, Inc., admitted Mr. Green was considered to be a qualified pilot by Continental (p. 343). Mr. Kenneth C. Sorby, Manager, Employment and Employee Relations, Continental Air Lines, Inc., called as a witness said of Mr. Green, "All you have to do, I think, is shake hands with this fellow and you realize you have a pretty good boy. He is very friendly. I have been impressed with him right along." (p. 405)

Continental asked four of the six June 1957 applicants to enter its training program in July 1957. (p. 353) Later, in August 1957, Continental hired ten pilots. (p. 325) The fifth of Green's contemporary applicants was ordered into the training program in September. (p. 365) Green was never asked to enter the training program, nor was he ever hired.

When Continental wired for Green to come to Denver, it did not know he was a negro, since he had not shown his racial designation as required by the application form furnished to him and one of the other of the six June applicants. (p. 235-237, 343) The form not requiring racial designation, was identified by respondent's witness Bell, as being the form used since January 1954. (p. 155) He could not explain how Green's application happened to require "race" and why he was requested to enter the word "negro" on the application blank by Captain Cramp, respondent's Assistant Chief Pilot. (p. 156)

When questioned as to why five of the six June 1957 applicants, were selected for training and Green was not, Mr. Bell said he didn't know exactly who or how the decision was made. Mr. Sorby, Continental's Personnel Manager, described the pilot selection as "quite informal" and "haphazard." He stated that qualified pilots were not rated showing one man better than another by reason of having more hours or something of that sort. He stated that, "It could be happenstance that Green with his record was omitted," and that the reason Green wasn't hired was that, "We didn't need that number of pilots." (p. 179, 184)

Continental's policy manual states that *applicants* "will be considered solely on the basis of fitness and ability for the work as determined by such factors as character, skill, intelligence and physical qualifications." It places responsibility for selection upon the department head or his designated representative to "select from the applicants referred to him by the Employment Manager, the individual *best suited* for the position." (p. 437) Mr. Sorbey stated that the pilot job is of high importance.

About July 8, 1957, Mr. Bell wired advising Green that he was not selected for the July training class. The telegram was sent to the address of his parents in Arkansas. (p. 435) Green was told this by Bell when he telephoned him long distance after waiting several days past July 4th, 1957, the last day of the promised ten within which he was told he would be notified. (p. 241) This telegram was not received by his parents. Continental's Exhibit 3, (p. 447) refers to such a telegram as undelivered.

Green was not given the usual interview at the place the other applicants received it, nor was he given a physical examination.

Continental ceased to consider Green for employment because of a newspaper article appearing in early August to the effect that Green had filed formal complaints alleging discrimination because Continental was not interested in those pilots who make the front page. (p. 328, 441)

Green filed a complaint with the Commission on August 13, 1957, Appendix B. (p. 165 of record) Continental was ordered to appear for a hearing on the Complaint on April 23, 1958. (p. 166) The Answer by Continental was filed on the day of the hearing which was had by agreement on May 7, 1958. (p. 180) The question concerning the conflict of the Colorado Anti-Discrimination Act of 1957, with Article I, Section 8, Clause 3 of the Constitution of the United States was raised by Continental in the "Third Defense" of said Answer, (p. 172-175) which in that part reads as follows:

"1. Respondent is engaged in the interstate transpor-

tation of passengers and freight by air by virtue of and subject to the laws, statutes and regulations of the United States applicable to interstate commercial carriers by air, including the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. Sec. 401 et seq.) and the railway Labor Act, as amended (45 U.S.C.A. Sec. 151 et seq.)

"2. By such laws, statutes and regulations the United States has pre-empted and reserved to its exclusive jurisdiction the regulation and control of interstate commercial carriers by air pursuant to the provisions of Article I, Section 8 of the Constitution of the United States.

"3. The provisions of the Colorado Anti-Discrimination Act of 1957, purporting to regulate and control Respondent in its operations as an interstate commercial carrier by air, are and constitute an undue burden on interstate commerce in violation of Article I, Section 8 of the Constitution of the United States.

"4. By reason thereof, the said Act is unconstitutional and void insofar as it purports to regulate and control Respondent's operations as an interstate commercial carrier by air."

Following the hearing and the submission of briefs, the Anti-Discrimination Commission rendered its Findings of Fact, Conclusions of Law and Orders relative to the Complaint of Marlon D. Green on December 19, 1958, wherein the Commission concluded the act was constitutional and that Continental had discriminated against Green. Appendix C. Continental was ordered to give

Green the first opportunity to enroll in its next training course with a priority status of June 24, 1957.

Continental appealed the decision of the Commission to the District Court of Denver, Colorado. Again the question of the violation of the Constitution of the United States was raised. At this point Green had his first opportunity to resort to the 1875 Enabling Act of the Congress of the United States. This he raised in his Answer to Continental's Petition to Review. (p. 33) The District Court remanded the case to the Commission to make findings of Fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the discrimination statute, and whether the job Green applied for actually involved interstate commerce. (p. 44, 45) As a result the Commission vacated the former decision and entered a new decision. (p. 526-544) Upon return to the District Court, the Court held the Commission, by its new order, had made the complaint moot. (p. 65) This decision was reviewed by the Colorado Supreme Court by Writ of Error, in case No. 19215, *The Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, (1960),.....Colo....., 355 P. (2d) 83. The Supreme Court held the Commission had no power to withdraw its first decision; therefore, its second decision was void. Since the trial court had never ruled on the review of the first decision of the Commission, it was ordered to do so.

The Commission and Respondent then entered into a Stipulation that (1). Respondent was engaged in interstate commerce; (2) the Commission would find Continental was subject to the Anti-Discrimination Act and (3) the job Green applied for involved interstate operations. (p. 550-551) The District Court then heard further argu-

ments and briefs were submitted. The District Court entered extensive Findings, Conclusions, and Judgment (p. 557-590) The Court held the Anti-Discrimination Law as applied to Continental violated the Constitution of the United States and since Congress had pre-empted the field Colorado's Anti-Discrimination law could not be applied to one engaged in interstate commerce, such as respondents, Continental Air Lines, Inc. Appendix D.

On review by way of Writ of Error, the Supreme Court affirmed the judgment of the District Court on the grounds that "with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a 'need for national uniformity,' and that the states are without jurisdiction to act in that area."

VII. GROUNDS AND REASONS FOR GRANTING CERTIORARI

Petitioners submit this is a case which comes within the provisions of Rule 19 (1) (a) of the Rules of this Court in that the decision of the Colorado Supreme Court concerns a federal question of substance not heretofore determined by this Court. Although this Court has decided many cases touching upon the power of the states to legislate in the area of interstate commerce, this Court has not been called upon to decide whether a state anti-discrimination statute prohibiting discrimination as to color by an interstate air carrier in its hiring practices falls within that area of interstate commerce which by nature requires uniformity of regulation and would be outside the state's power to so control by state legislation.

This Honorable Court has indicated such questions

are properly brought to this forum by their very nature. In this regard, we find the following statement by this Court in *Hall v. De Cuir* (1877), 95 U.S. 485, 488:

"The line which separates the powers of the States from this exclusive power of Congress is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line in all cases be located. *It is far better to leave a matter of such delicacy to be settled in each case upon a review of the particular rights involved.*" (Emphasis supplied.)

That a diversity of opinion exists as to whether the Colorado Anti-Discrimination Act of 1957 violates these premises is self-evident from the opinion herein of the Colorado Supreme Court, it being a 4-3 decision. Justice Frantz filed a lengthy dissent, as did Justice Pringle. Also, our former Justice Doyle, now judge of the Federal District Court of Colorado, filed a lengthy concurring opinion to the former opinion when this case was first before our Supreme Court in *Colorado Anti-Discrimination Commission v. Continental Air Lines* (1960), 143 Colo. 590, 355 P. (2d) 83, 86, in which he expressed views in accord with the present dissents of Justices Frantz and Pringle.

It is also of importance to note that in all the briefs heretofore submitted, including those of Amicus Curiae consisting of American Jewish Committee, Anti-Defamation League of B'nai B'rith, and the Civil Rights Division of the Department of Justice, counsel for each party con-

cerned have not been able to cite a case that has expressly answered the problem with which this case is concerned.

Petitioners' primary reason for believing the Writ of Certiorari should be granted rests upon the premise that the Colorado Supreme Court in relying almost entirely upon *Hall v. De Cuir* (1877), 95 U.S. 485, as supporting its opinion, misapprehended and wrongly applied the *De Cuir* case.

It was pointed out that *Hall vs De Cuir*, supra, was "handed down seventy-six years prior to *Brown v. Board of Education*, 247 U. S. 483;" that the case "has been evaded and devitalized" and that it "has no vitality today." To overcome such arguments, the Colorado Supreme Court cited *Huron Portland Cement Company v. City of Detroit* (1960), 362 U.S. 440, as current approval by this Court of the doctrine of *Hall v. De Cuir*, supra.

The *Hall v. De Cuir* case appears to have been cited in *Huron Portland Cement Company*, supra, for the basic principles of law pertaining to who shall regulate interstate commerce and not because of the facts of the case. In brief, *Hall v. De Cuir*, says that what is or is not a regulation of interstate commerce cannot be decided by any set standard, but must be considered on a review of the particular rights involved in each case. In *Huron Portland Cement Company*, supra, page 443, this Court said:

"In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce', . . . never

intended to cut the State off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

The Colorado Supreme Court also relied upon *Morgan v. Virginia*, 328 U.S. 373, 66 S. Ct. 1050, 90 L.Ed. 1317 as supporting its conclusion the interstate commerce clause permits only federal regulation of discrimination by an interstate carrier and that states have no power to legislate in this area. We believe the court also misapprehended the effect of this case because this court said, on page 378, of 328 U.S., to-wit:

"Burdens upon commerce are those actions of a state which 'directly impair the usefulness of its facilities for such traffic'. * * *. A burden may arise from a state statute which requires interstate passengers to order their movements on the vehicle in accordance with local rather than national requirements."

Since the Virginia statute required segregation of passengers, whereas the national policy required equal treatment, this court was right in applying the doctrines set out above and holding the act unconstitutional as was done in *Hall v. De Cuir*, supra. However, for the Colorado Supreme Court to apply these same rules to a state statute which is in conformity with and in the furtherance of the "national requirement" and to then reach the conclusion the statute is unconstitutional seems to be a clear misapplication of the case and a wrong result.

We submit that *Morgan v. Virginia*, supra, doesn't stand for the proposition that all regulation of discriminatory practice by an interstate carrier is vested in the federal government. On the contrary this court concluded only that the Virginia statute upset the balance between the police power of the state and the need for national uniformity.

This same conclusion is not applicable to the Colorado Anti-Discrimination Act of 1957 because the act does not affect the passengers — it only applies to the employees. No undue burden has or can be shown. There is an entirely different regulation of interstate commerce by a state statute which requires segregation of passengers by an interstate carrier when compared with a state statute which prohibits discrimination by an employer in the hiring of employees. The former concerns the primary purpose of the carrier — the passengers. The latter concerns only a tool or means of carrying passengers, being the pilot in this instance. The former is direct — the latter indirect. The former is prohibited — the latter is allowed. The Colorado Anti-Discrimination Act of 1957, as applied to respondent, Continental is in this latter category. It is a valid enactment pursuant to the police power of the state and in conformity with the national requirement.

Further, the Colorado statute merely codifies that which is guaranteed by the 14th Amendment of the Constitution of the United States and which is in furtherance of the Congressionally enacted Enabling Act to the Constitution of Colorado. To say that a statute which forces an interstate carrier to comply with the Constitution of the United States by giving equal rights, privileges and protection to all, can hardly be said to be an undue restric-

tion on interstate commerce and to be prohibited by any acts of Congress or by its silence upon the subject.

The second reason for granting the writ of certiorari is founded upon the premise that the opinion of the Supreme Court in this case had been decided in a way probably not in accord with applicable decisions of this Court. As stated previously, no decision of this Court can be found that is exactly in point, but of the cases found, *Railway Mail Association vs. Corsi* (1945), 326 U. S. 88, seems most closely in point and should be controlling here. Had the Supreme Court of Colorado followed the rationale of that case, the decision herein would have been to the contrary.

The part of the *Corsi* case with which we are concerned has to do with the argument presented by the petitioner, Railway Mail Association, that the New York anti-discrimination law conflicted with Article I, Section 8, Clause 7, of the Federal Constitution and that Congress had preempted the field; thereby precluding New York from applying its anti-discrimination law. This Court rejected these arguments by holding that "Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties before the police power of the state is powerless." This Court found "no such clear manifestation of Congressional intent to exclude" in the *Corsi* case.

The foregoing principle and rationale are particularly applicable to the case at bar. In *Corsi*, supra, the Constitutional provision cited authorizes Congress to establish postoffices and post-roads. The constitutional provision in our case authorizes Congress to control interstate com-

merce. If the State of New York can legislate and control membership practices of the postoffice employees organization, can't Colorado legislate and control employment practices of an interstate carrier who does its hiring and maintains its employment office in Colorado? We submit that Colorado can so legislate and apply its statute to such a carrier as Continental.

VIII. CONCLUSION

The foregoing statements raise serious doubts as to the correctness of the decision of the Colorado Supreme Court. We believe it is of utmost importance that this Honorable Court undertake a detailed review of this case and the broad ramifications of the principles involved.

WHEREFORE, petitioners pray this Petition for Writ of Certiorari be granted so that the injustice done to Marlon D. Green can be corrected.

Respectfully submitted,

DUKE W. DUNBAR,
Attorney General,

FLOYD B. ENGEMAN,
Assistant Attorney General,

104 State Capitol,
Denver 2, Colorado,

Attorneys for Petitioners.

Appendix A
IN THE
SUPREME COURT OF THE STATE OF COLORADO

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as members of said Commission and MARLON D. GREEN,

Plaintiffs in Error,

v.

CONTINENTAL AIR LINES, INC.,
Defendant in Error.

Error to the
District Court of the
City and County of
Denver

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the court that there is no error in the proceedings and judgment of said District Court.

It is therefore ordered and adjudged that the judgment of said District Court be; and the same is hereby, affirmed, and that it stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said writ of error.

By the Court. En Banc. February 13, 1962.

CLERK'S OFFICE
SUPREME COURT

STATE OF COLORADO

DENVER 2

March 5, 1962

Case No. 19771

The Colo. Anti-Discrimination
Comm., et al.,

v.

Continental Air Lines, Inc.

The Honorable Duke W. Dunbar,
Attorney General,
State Capitol,
Denver, Colorado.

Dear Sir:

On consideration of the petition for rehearing in the above numbered and titled cause the court today ordered the opinion heretofore filed herein modified and as modified adhered to, and that the petition for rehearing be denied.

Please substitute the enclosed page 5 for the liked numbered page in the opinion of the court filed in the above numbered and titled case, February 13, 1962.

Yours very truly,

GEORGE A. TROUT, Clerk.

By Florence Walsh
Deputy Clerk.

Received March 5, 1962, office of the Attorney General.

**IN THE
SUPREME COURT OF THE STATE OF COLORADO**

The Colorado Anti-Discrimination
Commission, et al.,

Plaintiffs in Error,

19771 vs.

Continental Air Lines, Inc.,
Defendant in Error.

Error to the
District Court
City and County of
Denver

The court having considered the petitions of plaintiffs in error for rehearing in said cause, and now being sufficiently advised in the premises, it is this day ordered that said petitions be, and the same hereby are, denied.

By the Court. En Banc. March 5, 1962.

NO. 19771

THE COLORADO ANTI-DISCRIMINATION COMMISSION and EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE and GEORGE O. CORY, as members of said Commission and MARLON D. GREEN,
Plaintiffs in Error,

Error to the
District Court of the
City and County of
Denver

v.

CONTINENTAL AIR LINES, INC.,
Defendant in Error.

Honorable William A. Black, Judge

EN BANC

JUDGMENT AFFIRMED

Mr. Duke W. Dunbar, Attorney General,

Mr. Frank E. Hickey, Deputy Attorney General,

Mr. Charles S. Thomas, Assistant Attorney General,
Attorneys for Plaintiff in Error
Anti-Discrimination Commission.

Mr. T. Raber Taylor,

Attorney for Plaintiff in Error

Marlon D. Green,

Messrs. Holland & Hart,

Mr. Patrick M. Westfeldt,

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Mr. Arnold Forster of the New York Bar,
General Counsel,
Mr. Paul Hartman, of the New York Bar,
Mr. Sol Rabkin, of the New York Bar,
Associate Counsel,

For the Anti-Defamation League of B'nai B'rith.

Mr. Edwin J. Lukas, of the New York Bar,
General Counsel,

Mr. Theodore Leskes, of the New York Bar,
Associate Counsel,
For the American Jewish Committee.

Messrs. Donaldson, Hoffman & Goldstein,
Counsel for the Anti-Defamation League of
B'nai B'rith.

Mr. Charles Rosenbaum,
Counsel for the American Jewish Committee.

Mr. Mandel Berenbaum,

Mr. Louis G. Isaacs,

Mr. Joseph Moskó,

Mr. James Radetsky,

Mr. Stanton Rosenbaum,

Mr. Walter M. Simon,

Mr. Anthony F. Zarlengo,

Mr. William S. Powers,

Amici Curiae.

MR. JUSTICE MOORE delivered the opinion of the Court.

Marlon D. Green filed a complaint before the Colorado Anti-Discrimination Commission in which he alleged that the Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a Negro. It was further alleged that Continental Airlines violated the said act in that its forms of application for employment as a pilot contain at least two specifications prohibited by the act, namely, attachment of a photograph and requiring the applicant to state his race.

After a hearing before the Commission it ordered that:

“The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957.”

On review of the commission's order the district court held that the Colorado Anti-Discrimination Act, in so far as it purported to regulate the employment of flight crew personnel of an interstate air carrier, was invalid as creating a burden upon interstate commerce. The trial court entered a judgment ordering the dismissal of Green's complaint before the commission. Green and the commission are here by writ of error seeking reversal of the judgment.

In 1937 the General Assembly enacted the following statutes — (now C.R.S. '53, 5-1-2, 5-1-3 and 5-1-8).

“5-1-2: NAVIGATION OF AIRCRAFT: The public safety requiring and the advantages of uniform

regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be prescribed by the United States government with respect to navigation or aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

"5-1-3: LICENSE FOR NAVIGATION: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States government shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

"5-1-8: INTERPRETATION: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics."

Thus in 1937 the legislature gave recognition to federal laws and regulations in the realm of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides in C.R.S. '53, 80-24-2 (5):

“ ‘Employer’ shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state: * * * ”

80-24-6 (2) provides that it shall be an unfair employment practice,

“For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry.”

Continental Airlines, among other defenses not necessary to consider, raises the question of whether the Anti-Discrimination Commission has any jurisdiction over the subject matter of the action.

It is admitted that Continental is a commercial carrier by air; that it operates pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. The company provides air transportation

for passengers, freight, and United States mail between the states of Colorado, Texas, Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce, and it was further agreed that the particular employment sought by Green involved interstate operations.

Continental contends that the Colorado statute under which these proceedings were instituted, as applied to the facts of this case, is unconstitutional and void under Article I, Sec. 8, clause 3 of the Constitution of the United States which provides:

“The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The trial court adjudged in effect that the Colorado Anti-Discrimination Act cannot constitutionally be extended to cover the hiring of flight crew personnel of an interstate air carrier; that if said Act be applied to the hiring contracts of interstate air carriers it would unconstitutionally burden interstate commerce and would amount to an invasion of a field pre-empted by the United States under (a) The Railroad Labor Act; (b) the Civil Aeronautics Act; and (c) Federal executive orders dealing with discrimination by employers contracting with the federal government. The trial court entered judgment setting

aside the findings of the commission and dismissing Green's complaint.

The United States and certain other groups interested in the subject matter of the controversy were granted leave to file briefs as *amici curiae*. In the brief filed by the Assistant Attorney General of the United States, argument is advanced under separate captions as follows:

"I. The Commission's assertion of jurisdiction herein does not unconstitutionally burden commerce.

"II. Colorado is not precluded by federal legislative or executive action from applying its anti-discrimination policy to the hiring practices of interstate air carriers."

Counsel for Green, in substance, make the same argument on the question of whether the State of Colorado has jurisdiction to regulate the hiring practices of those engaged in interstate air transportation.

With reference to the above stated propositions Continental presents lengthy argument under the following captions:

"1. The Colorado Anti-Discrimination Act May Not Constitutionally be Applied to Flight Crew Personnel of an Interstate Air Carrier.

"A. Application of the Colorado Anti-Discrimination Act to the Facts of This Case is Unconstitutional as a Burden on Commerce.

“B. Acts of Congress have Pre-empted the Subject Matter of this Litigation, Thereby Precluding Action by the States.”

Although additional arguments on other matters are contained in the briefs, they were not determined in the trial court. The only question resolved was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground.

The first question to be resolved on this writ of error is whether the Colorado Anti-Discrimination Act may be applied to flight crew personnel of an interstate air carrier. If the question is answered in the negative ~~other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution, are academic and of no materiality to the issue to be determined.~~

The trial court entered extensive Findings of Fact, Conclusions of Law and Judgment. As set forth in the appendix to the brief of Continental, this document consists of thirty-eight printed pages. It is very apparent that the learned trial judge gave careful consideration to the numerous decisions of the Supreme Court of the United States which bear upon the issue. Many of them are analysed in the judgment entered by the court. The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result.

From the numerous opinions written by the United

States Supreme Court dealing with the legality of state regulation of those engaged in interstate commerce, two basic propositions have been firmly established, to-wit:

(1) In those areas of interstate commerce which by their nature require uniformity of regulation by a single authority, the states are without power to act even though Congress has not legislated on the subject; and

(2) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are in some substantial degree of local concern; once the Congress does legislate upon the subject, it pre-empt the field and the states are thereafter without power to act.

An attempt by the state to apply a statute imposing burdens or restrictions upon persons engaged in either of the foregoing areas of interstate commerce will be set aside and held for naught as contravening the plenary power of the Congress to regulate interstate commerce. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299, 13 L. Ed. 996; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515; *Minnesota Rate Cases*, 230 U.S. 352, 33 S. Ct. 729. This power in Congress is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution." *Gibbons v. Ogden*, 9 Wheat 1, 6 L. Ed. 23.

Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States. Whatever our private

notions may be on the subject, the opinions of the U. S. Supreme Court have established the rule.

In *Hall v. De Cuir*, 95 U.S. 485, 24 L. Ed. 547, (1877), the court had before it a Louisiana statute which prohibited discrimination in passenger accommodations within the state. The defendant, owner of a passenger steamship which traveled the Mississippi River between Louisiana and Mississippi, had refused certain accommodations to a Negro and was sued by her. The court concluded that the statute as applied to those engaged in the transportation of passengers among the states was unconstitutional. The court said, *inter alia*:

“But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position.”

In *Morgan v. Virginia*, 328 U.S. 373, 66 S. Ct. 1050, a statute of the State of Virginia required segregation of white and colored passengers for both intrastate and interstate motor vehicle carriers. An interstate passenger who was a Negro challenged the validity of the statute as placing a burden on interstate commerce. The court held that the statute as applied to interstate carriers was unconstitutional. *Hall v. De Cuir, supra*, was approved in the following language:

“The factual situation set out in preceding paragraphs emphasizes the soundness of this court’s early conclusion in *Hall v. DeCuir*.”

Counsel seeking reversal of the judgment of the trial court attempt in various ways to discredit the opinion of *Hall v. DeCuir*. It is asserted in the brief filed by the United States as amicus curiae that *Hall v. DeCuir* was "handed down seventy-six years prior to *Brown v. Board of Education*, 247 U. S. 483"; that the case has "long been eroded and devitalized" and that it "has no vitality today." The Supreme Court of the United States has not so indicated. *Brown v. Board of Education*, *supra*, did not involve interstate commerce. As recently as 1960 *Hall v. DeCuir* was cited with approval in *Huron Portland Cement Company v. City of Detroit*, 362 U. S. 440, in which the United States Supreme Court said: "But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hall v. DeCuir*, 95 U.S. 485."

Our attention is invited to the fact that the United States does not consider *Hall v. DeCuir*, to be "devitalized" in those matters in which application of the doctrine for which it is authority will promote a result sought by the government. On September 2, 1960, the United States appearing by counsel, who are on the brief in the instant case, filed a brief as amici curiae with the Supreme Court of the United States in *Boynton v. Virginia*, 364 U. S. 454, in which we find the following:

"Thus, even in the absence of congressional action, the Commerce Clause, of its own force, requires invalidation of unreasonable state-imposed burdens on interstate commerce. See *Morgan v. Virginia*, 328 373; *Hall v. DeCuir*, 95 U. S. 485. * * *

Thus it will be seen that counsel for the United States,

appearing here as *amicus curiae*, attempts like the Roman god Janus to face both ways.

The State of Colorado either does or does not have power to legislate concerning racial discrimination by employers engaged in interstate commerce. The authority of the state does not come into existence in the event the exercise thereof will produce a result which may tend to promote a particular cause and then disappear or become impotent when the exercise thereof may lead to a different result. Jurisdiction to function does not depend upon what results will flow from the exercise of regulatory power.

The Supreme Court of the United States has clearly indicated that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a "need for national uniformity," and that the states are without jurisdiction to act in that area. *Morgan v. Virginia, supra*.

The judgment is affirmed.

MR JUSTICE FRANTZ, MR. JUSTICE McWILLIAMS
and MR. JUSTICE PRINGLE dissent.

No. 19771

Colorado Anti-Discrimination Comm.

v.

Continental Air Lines

MR. JUSTICE FRANTZ dissenting:

The overriding and cardinal purpose of this case is to ascertain the relation between federal and state authority based upon the fundamentals of the commerce clause (U. S. Const. Art. 1, §8, cl. 3) and the equal protection mandate to the states contained in the 14th Amendment to the Federal Constitution. Is there an area of accommodation between nation and state in which the state may act affirmatively to see that no one is denied employment by reason of his "race, creed, color, national origin or ancestry," notwithstanding the employment will require travel over state lines?

The majority opinion believes that a valid reconciliation is not possible, and that the Colorado Anti-Discrimination Act of 1957 is ineffectual as to employment contracts of Continental Air Lines, Inc., an interstate commercial carrier by air. Since I do not share this belief, I voice a view at variance with the majority.

At least five reasons come to my mind which provoke dissent. There may be other cogent and perhaps more convincing reasons for opposing the majority opinion, but those which move me to disagree are, in my opinion, principles established in law and reason. Their application brings into proper perspective the interrelation of the two federal constitutional provisions already adverted

to, and establishes the propriety of the Colorado act as it affects Continental's operations. *United States v. Underwriters Ass'n.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440.

Before launching into a discussion of these reasons it would be well to keep in mind that the Colorado Anti-Discrimination Commission had made findings adverse to Continental, and that these findings are based upon evidence. And the Commission made the critical finding that the only reason that Green "was not selected for training school [was] because of his race." It is suggested that a better understanding of this controversy will be realized by reading the opinions in *Commission v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P. (2d) 83, to which the present matter is a sequel.

I would now enumerate my reasons for holding the Colorado act to be in harmony with the commerce clause.

1. A contract of employment is not commerce; it is not an intangible that enters into the stream of commerce just because the employee travels from state to state.
2. Conditions of employment, statutorily imposed, forbidding hiring on the basis of race, creed, color, national origin or ancestry are federally recognized as being properly within the sphere of state police power and in this connection inoffensive to the commerce clause.
3. It is a traditional concept of the federal government that an employment contract is ordinarily controlled by the law of the state where made, and reasonable regulation of the state regarding such contracts will be honored by the nation.
4. State laws prohibiting discrimination on the basis of race, creed, color, national origin or ancestry are in aid of commerce and not a burden on it, and hence sanctioned

by the federal government. 5. By enacting laws banning such discrimination the state merely implements and fulfills the interdictions of the 14th Amendment to the national Constitution, and exercises the power delegated thereunder to preserve the rights of citizens, required by the Federal Constitution to be protected by the states.

1. A contract of employment of a pilot of an interstate carrier by air is not interstate commerce. Such contract per se does not move in commerce, although the employment thereunder requires operation of airplanes through several states. If Green had been hired, at once the employment relationship would have been established: Continental as employer and Green as employee would have become a *fait accompli*. Nothing could be a more localized activity; the creation of the contract arose within the state; its existence resulted from an activity wholly within the state.

True, that which Green would have done as a result of the *established* relationship would have been interstate commerce. Affording due regard to the distinction between the local matter of employment, and the activities of the employee thereafter as commerce, is not a strained and tenuous process. Federal courts have recognized that the mere fact that a domestic transaction generates a movement in interstate commerce is not sufficient to declare the transaction interstate commerce. *Jewel Tea Co. Williams*, (10th Cir.) 118 F. (2d) 202.

Indeed, the federal courts sound warnings against encroachment on state competence. "If the power to regulate interstate commerce applied to all the incidents to which said commerce rise to all contracts which

might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature." *Hooper v. California*, 155 U.S. 648, 15 S.Ct. 207, 39 L.Ed. 297.

"Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352.

Although the present problem is one without precedent, we are not without straws in the wind. The Supreme Court of the United States asked itself "whether a state law taxing occupations is invalid so far as applicable to the pursuit of the business of *hiring persons to labor outside the state limits*, because in conflict with the Federal Constitution." (Emphasis supplied.) *Williams v. Fears*, 179 U.S. 186, 21 S.Ct. 128, 45 L.Ed. 186.

Its answer has relevance to our problem:

"* * * These labor contracts *were not in themselves subjects of traffic between the states*, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that

it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce." (Emphasis supplied.)

"[B]y the law of New York the creation of an agency is to be determined by the law of the place where the acts take place which are relied upon to create it." *Siegmán v. Meyer*, 100 F. (2d) 367. The question of agency "is to be determined by the law of New York, because the scope of an agent's authority depends upon the law of the place where the authority is conferred." Per Learned Hand in *Still v. Union Circulation*, 101 F. (2d) 11. The place where the contract of employment is made is controlling as to the law. *Moore v. Ill. Central R. Co.*, 136 F. (2d) 412; *Hablas v. Armour & Co.*, 270 F. (2d) 71; *Helfer v. Corona Products*, 127 F. (2d) 612.

Contracts for advertising space in a national magazine, though involving publishing advertising and the mailing and distribution of magazines outside the state, are "peculiarly local and distinct from * * circulation whether or not that circulation be interstate commerce." *Western Live Stock v. Bureau of Internal Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823.

"That which in its consummation is not commerce does not become commerce among the states because the transportation that we have mentioned takes place. To repeat the illustrations given by the court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer

goes to another state." *Federal Baseball Club v. National League*, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898, 26 A.L.R. 357.

I would hold that the contract of hiring, as it established an employment relationship, would have been consummated in the State of Colorado and subject to the domestic laws of the state. The fact that Continental engaged itself to carry passengers by air through several states, and that Green would have been a part of the air flight personnel, would have been an incident of the contract of employment. Continental's engagement to carry passengers would have been interstate commerce. Green's contract would not have been an undertaking to carry A, B and C as passengers outside the state; his engagement would have been to work at a certain position for Continental.

2. A state enactment, having as its objective the prevention of contractual discrimination in employment emanating from prejudice or preference concerning race, religion, color, national origin or ancestry, is sanctioned as the proper exercise of the police power of the state, even though its effect in particular cases may result in an impact on interstate commerce. Where the law thus bears upon such commerce, the federal courts generally find no invalidating encroachment on the national domain in commerce.

That statutory laws prohibiting discrimination on the basis of color, race, creed, national origin or ancestry in connection with certain relationships find validity in the police power cannot be controverted. "The execution of this power and the enactment of laws pursuant to it are

necessary to the well-being of the people of all civilized communities." *Bolden v. Grand Rapids Operating Corp.*, 239 Mich. 318, 214 N.W. 241, 53 A.L.R. 183. See "Employment Discrimination," 5 Race Relations Reporter 569 (1960).

Legislation directed against racial or religious discrimination is action "within the bounds of the police power." *New York State Commission v. Pelham Hall Apts.*, 170 N.Y.S. (2d) 750. It is declarative of the state's public policy against discrimination, *Application of Association for the Preservation of Freedom*, 188 N.Y.S. (2d) 885; and its purpose is the promotion "of the public good," *City of Chicago v. Corney*, 13 Ill. App. (2d) 396, 142 N.E. (2d) 160.

Legislative measures aimed against "discriminations in the areas of employment predicated upon prejudices and preferences arising out of race, religion, color or national origin" establish a public policy for the state concerning the relationship of employer and employee. *U. S. National Bank v. Snodgrass*, 202 Ore. 530, 275 P. (2d) 860, 50 A.L.R. (2d) 725.

Recognition of such legislation as the exercise of the state's police power has been accorded by the Supreme Court of the United States. "And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states." *District of Columbia v. Thompson Co.*, 346 U.S. 100, 73 S.Ct. 1007, 97 L.Ed. 1480. See *Railway Mail Ass'n. v. Corsi*, 326 U.S. 88, 65

S.Ct. 1483, 89 L.Ed. 2072; *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455.

Conditions of employment between one operating in interstate commerce and an employee, fixed by the state under its police power, have been the subject of attack in the federal courts. Thus, in *Smith v. Alabama*, 124 U.S. 465, 8 S.Ct. 564, 31 L.Ed 508, a statute of Alabama was claimed to be in violation of the Federal Constitution. The statute made it a misdemeanor for an engineer to operate, *in the state*, a train of cars, used for the transportation of persons or freight without first undergoing an examination and obtaining a license from a board appointed by the Governor. The examination involved the character and habits of the applicant. Provision was made for denial or revocation of a license upon certain contingencies appearing.

Smith v. Alabama concerned an engineer whose ordinary run was over the Mobile and Ohio Railroad Company's road between Mobile, Alabama and Corinth, Mississippi. He never handled the engine between points wholly within Alabama. He also operated an engine pulling a passenger train between St. Louis and Mobile. It was contended that the statute contravened the commerce clause of the Federal Constitution.

In disposing of the contention the Supreme Court said:

"In conclusion, we find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied

as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public, safety of person and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

A statute of Alabama provided for the protection of the travelling public against accidents resulting from color-blindness and defective vision of railroad employees, and to that end required an examination before a state board of any person seeking a position that involved the running or management of a railroad train. Its validity was questioned on the theory that it interfered with interstate commerce in the case of *Nashville, C. & St. L. Ry. v. Alabama*, 128 U.S. 96, 9 S.Ct. 28, 32 L.Ed. 352.

The railway company operated its lines through several states and had as a train conductor one who had not secured a certificate of his fitness in compliance with the Alabama statute. After reaffirming the doctrine enunciated in *Smith v. Alabama*, *supra*, the Supreme Court stated that "[s]uch legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

A state statute prescribing a not unreasonable number for the crews of freight trains "is not in any proper sense a regulation of interstate commerce nor does it deny the equal protection of the laws. Upon its face, it must be taken as not directed against interstate commerce, but as having been enacted *in aid*, not in obstruction, of such commerce and for the protection of those engaged in such commerce." (Emphasis supplied.) *Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453, 31 S.Ct. 275, 55 L.Ed. 290. See *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010.

A state may prescribe regulations for the payment of wages of employees of railway carriers, and so far as such law "affects interstate commerce, it does so indirectly." *Erie R. Co. v. Williams*, 233 U.S. 685, 34 S.Ct. 761, 58 L.Ed. 1155, 51 L.R.A.N.S. 1097. A California statute required every "transportation agent" to obtain a license assuring his fitness and to file a bond securing faithful performance of the transportation contracts which he negotiated. Its apparent purpose was to protect the public from fraud and overreaching. In *California v. Thompson*, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, the court held the regulation not to be violative of the commerce clause, saying:

"As this Court has often had occasion to point out, the Commerce Clause, in conferring on Congress power to regulate commerce, did not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power, even though the regulation affects interstate commerce. Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board*

of *Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce, but which because of their local character and their number and diversity may never be adequately dealt with by Congress."

These decisions evidence the solicitude of the Supreme Court for sustaining the police power of the states in matters relating to certain kinds of contracts, and in particular employment relationships, even though the exercise of such power affects interstate commerce. Citation of these authorities does not pretend to be exhaustive, but it represents a good sampling from which we can deduce validity of the act here under attack. See *Colorado Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

3. Employment contracts are ordinarily of local concern, and controlled by the laws of the state where made. That they have relation to commerce among the states does not necessarily make them vulnerable to attack as being made pursuant to state laws which affect commerce. Legislation regarding contracts, aimed at regulation of rights, duties and liabilities of the contracting parties, is properly within the sphere of state activity, and even though it affects commerce, such impact is deemed indirect and hence valid. Should the federal government clearly preempt the area in which the state has acted, then exclusion of state action takes place.

Early in its history the Supreme Court of the United States stated that generally "the legislation of a State, *not directed against commerce* or any of its regulations, but relating to the *rights, duties, and liabilities* of citizens, and only indirectly and remotely affecting the operations

of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." (Emphasis supplied.) *Sherlock v. Alling*, *Adm.*, 93 U.S. 99, 23 L.Ed. 19.

The doctrine of *Sherlock v. Alling* has been applied in later cases decided by the federal appellate courts. A resort to *Shepard's United States Citations* reveals its durability. And the doctrine has been applied to statutes of a state which impose conditions in order, to effectuate an employment relationship. *Smith v. Alabama*, *supra*; *Nashville, C. & St. L. Ry. v. Alabama*, *supra*; *Chicago, R. I. & Pac. Ry. v. Arkansas*, *supra*. See *Richmond & Allegheny R.R. v. Tobacco Co.*, 169 U.S. 311, 18 S.Ct. 335, 42 L.Ed. 759; *Chicago, M. & St. P. Ry. v. Solan*, 169 U.S. 133, 18 S.Ct. 289, 42 L.Ed. 688. Last approved in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed. (2d) 852.

In *Smith v. Alabama*, *supra*, the court was dealing with state required examination and licensing of locomotive engineers. In holding the state legislation valid and inoffensive to the commerce clause, the court expressly made applicable the above language quoted from *Sherlock v. Alling*, *supra*. The sanction of the opinion extended to "regulating the *relative rights and duties* of persons within the jurisdiction of the State, and *operating on them*, even when engaged in the business of interstate commerce." (Emphasis supplied.)

Rights and duties settled by contract afford grounds for state intervention where the state can with propriety establish a public policy regarding them. Particularly is

this true in relation to employment contracts — indeed, this has been a fertile field in recent years for the ordination of policy measures. Here personal relations are fundamental, and the greater the skill required of the employee, the greater is the personal element involved.

A contract is a juridicially recognized engagement between persons by which their rights and duties concerning a subject matter are established. *Dartmouth College v. Woodward*, 17 U.S. 518, 4 Wheat. 518, 4 L.Ed. 629. Ordinarily, juridical recognition is a matter of domestic concern. And, as already noted, the policy of the state may be exerted to require certain conditions in making the engagement before it shall have a binding effect upon the parties.

Rights and duties imposed by the parties upon themselves by agreement are pivotal concepts; to the Supreme Court they have significance in determining whether a matter presented to it indicates an intrusion on commerce. If legislation of the state is patently and essentially concerned with the rights and duties of persons, inter se, and said legislation in particular cases has an incidental or adventitious impingement on commerce among the states, the Supreme Court seems inclined to hold it related to a localized activity, and its influence on commerce not measurably significant.

All the elements necessary to the application of this doctrine are here present. Green is a qualified applicant for a position requiring special skills. A contract between Continental and Green would involve these skills, and hence the personal element creating a special, individual-to-individual relationship with rights and duties pervading

it. The generality of the anti-discrimination law, evidently directed to employment generally, without intent to burden commerce, when brought into perspective with the immediate problem of hiring a person with special skills, leaves us with a law innocuous to interstate commerce.

4. The Colorado Anti-Discrimination Act is in aid of, and not a burden on, commerce. States may not deny persons within their jurisdictions the equal protection of the laws. U.S. Const., XIV Amend. May that which the states are prohibited from doing become the subject of harmonious, positive legislation by the states? May the states provide for equal treatment of persons within their jurisdictions by legislation? If they may, does the fact that commerce may be incidentally affected, invalidate such legislation?

“The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race, — the right to exemption from *unfriendly legislation* against them distinctively as colored, — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race.” (Emphasis supplied.) *Strauder v. West Virginia*, 100 U. S. 303, 25 L.Ed. 664. It would appear that *friendly legislation* is implicitly invited.

State laws having local aspects “are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress

has not legislated upon the particular subject, they are rather to be regarded as *legislation in aid of commerce*, and as a rightful exercise of the police power of the State *to regulate the relative rights and duties of all persons and corporations within its limits.*" (Emphasis supplied.) *Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 24 S.Ct. 132, 46 L.Ed. 268. *Richmond & Allegheny R.R. v. Tobacco Co.*, *supra*; *Chicago, M. & St. P. Ry. v. Solan*, *supra*; *Mobile County v. Kimball*, 102 U.S. 691, 26 L.Ed. 238.

So long as the federal government has not made clear its intent to act exclusively in the regulation of an area of commerce, the nation and the state may march hand in hand concerning it in advancing parallel policies against discrimination based on race, creed or color. *Bob-lo Excursion Co. v. Michigan*, *supra*. In a footnote of the opinion the court says, "The direction of national policy is clearly in accord with Michigan policy."

5. Colorado has activated the prohibitions of the Federal 14th Amendment by enacting a law forbidding discrimination in employment based on race, creed, color, national origin or ancestry. Under the 14th Amendment a person has a *federal right* not to be discriminated against by the state on the basis of race, color, creed or national origin; under the Colorado statute the state creates a similar right running against such discrimination by anyone, including a private party. What was a federal right thus becomes a broadened state right by virtue of the statute. See Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment*, 43 Cornell L. Quar. 375.

The 14th Amendment is directed against discrimina-

tory state action; the Colorado Anti-Discrimination Act is state action, but consistent with, although having a broader base than, the 14th Amendment. See *Bob-lo Excursion Co. v. Michigan*, *supra*. *Ferguson v. Gies*, 82 Mich. 358, 46 N.W. 718, 21 Am.S.R. 576, 9 L.R.A. 589, indicates that state laws putting "the colored citizen upon an equal footing in all respects with the white citizen" is nothing more than the declaration by the states of what the Federal Constitution ordains.

Contention was made in *Railway Mail Ass'n v. Corsi*, *supra*, that the New York Civil Rights Law offended the due process clause of the 14th Amendment. It seems to me that the answer of the Supreme Court is a manifestation of a view which would hold the Colorado act valid, as making effectual by state action in an affirmative way the 14th Amendment. The court said:

"* * * We have here a prohibition of discrimination in membership or union services on account of race, creed, or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees."

Since it is seriously doubted whether the federal government has assumed exclusive control of the employment

in question, we should heed these words in the decision of *Railway Mail Ass'n v. Corsi, supra*:

“This provision can hardly be deemed to indicate an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees. *Congress must clearly manifest an intention to regulate for itself* activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless.” (Emphasis supplied.)

No such clear manifestation appears in this case.

In the course of this opinion I have accepted as fact that the Anti-Discrimination Act will on occasion exert an influence on commerce among the states. The act was designed to accomplish a purpose wholly within the letter and spirit of the 14th Amendment, and contains no exception as to employment involving duties requiring movement between states. In this respect interstate commerce will be affected, but not detrimentally. How can it be contended that state action which is obedient to the 14th Amendment does anything other than aid commerce?

Had the federal government clearly acted against discrimination in manner showing that preemption had taken place, the state would have no authority to act. But, as Justice Doyle demonstrated in his specially concurring opinion in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., supra*, no federal preemption has been effected.

MR. JUSTICE McWILLIAMS authorizes me to say that he concurs in this dissent.

Appendix B

BEFORE THE

COLORADO ANTI-DISCRIMINATION COMMISSION

655 Broadway
Denver 3, Colorado

No. 25

Marlon D. Green,

Complainant,

vs.

Continental Airlines, Inc.

Respondent.

For complaint against the Respondent above named, Com-
plainant alleges:

1. That Respondent, Continental Airlines, Inc., a private employer, whose address is Stapleton Airfield, Denver, Colorado, and who is engaged in the business of operating a commercial airline, has violated the Colorado Anti-Discrimination Act of 1957 in the following respects:

2. That on or about July 8, 1957, Respondent refused to employ Complainant as a commercial airline pilot because he is a Negro.

3. That Respondent failed to advise Complainant as to the action taken on his application for employment

within the ten-day period of time between June 26, 1957, the completion date of interviews and flight tests, and July 5, 1957, as promised:

4. That Respondent's Application for Employment form contains at least two specifications prohibited by the Colorado Anti-Discrimination Act of 1957, viz., attachment of photograph and applicant's race.

WHEREFORE, the Complainant requests the Colorado Anti-Discrimination Commission to use whatever powers are at its command to eliminate the foregoing alleged discriminatory or unfair employment practices; and for such other and further relief as may be within the Commission's jurisdiction.

Complainant's address:

913 Nipp Street
Lansing, Michigan

/s/ Marlon D. Green

Marlon D. Green, Complainant

Subscribed and sworn to before me this 13th day of Aug. 1957, by Marlon D. Green.

My commission expires March 8, 1958

/s/ H. Marie Brower

Notary Public

(Seal)

Notary Stamp

Appendix C
BEFORE THE
COLORADO ANTI-DISCRIMINATION COMMISSION
OF THE STATE OF COLORADO

No. 25

Marlon D. Green,

Complainant,

vs.

Continental Airlines, Inc.

Respondent.

*FINDINGS OF
FACT,
CONCLUSIONS OF
LAW and ORDERS*

**RE GREEN, COMPLAINANT V. CONTINENTAL
AIR LINES, INC., RESPONDENT.**

The Complainant alleges a violation of the Colorado Anti-Discrimination Act of 1957, basically in the allegation that the Respondent refused to employ the Complainant as a commercial air line pilot because he is a Negro. The Respondent denies that it has violated the Act. It questions the jurisdiction of this Commission and the constitutionality of the Act.

The Complainant is a resident of 608 North Logan, Lansing, Michigan and is presently engaged as the Department Pilot for the Michigan State Highway Department.

The Respondent is a duly authorized and certificated

commercial carrier by air and maintains an office at Stapleton Airfield, Denver, Colorado.

Complainant filed application for employment as a pilot with the Respondent on April 30, 1957; the application contained a request for two photographs of head and shoulders not over 1½ x 2½ inches taken within the last 12 months and which application also had a space for racial identity.

At the time Complainant made application for employment with Respondent, he was a rated pilot so designated by the U. S. Air Force, as of 24 March 1951.

Complainant during his military career had flown the T-6 Trainer, the B-25, the B-29, the B-26, the 5A-16, the C-45 or Twin Beach, the C-97 and C-47.

The Complainant as of June 26, 1957 had logged 3,071 hours flying time as evidenced by Air Force Form 5, on file with the Director of Flight Safety Research, Norton Air Force Base, California.

Complainant's rank when discharged from the Air Force was that of Captain.

Complainant arrived in Denver, June 24, 1957 for employment interview with Respondent.

Complainant was directed by Captain Cramp to the link trailer department for a check ride in the link trainer.

On the following day Complainant took a flight check with Captain Cramp and after the flight check, was advised that he could return to Lansing, expecting the reply from Respondent in about ten days.

Complainant was not selected for the July training class; Complainant's application was kept in a file of eli-

gible checked out-pilots. He was still retained as an eligible candidate for pilot position. It was admitted that he was a good pilot and met Respondent's minimum qualifications.

Complainant's application was withdrawn from further consideration in the early part of August because Respondent was made aware of some publicity appearing in the Albuquerque Journal of August 4.

The Respondent is guilty of a discriminatory and unfair employment practice in requiring on its application form, the racial identity of the applicant and the requirement of a photo to be attached to the application, each of which is contrary to regulations adopted by this Commission under Section 4, sub-section 2 of Chapter 176, Session Laws of 1957, also known as the Colorado Anti-Discrimination Act of 1957.

From the applications submitted to the Commission for review, we find: —

Applicant, Marlon D. Green with a total of 3,071:30 flying hours with multi-engine equipment.

Applicant No. 2 with a total of 1,150 flying hours.

Applicant No. 3 with a total of 1,000 flying hours in single engine equipment, mostly jet.

Applicant No. 4 with a total of 2,100:53 flying hours.

Applicant No. 5 with a total of 1200 flying hours, in multi-engine equipment.

Applicant No. 6 with a total of 1031 flying hours in single engine equipment.

Based on a review of the applications for employment

of the several persons interviewed at the time Mr. Green was interviewed, it appears that Complainant had more flying hours than any other applicant and was better qualified for the position of co-pilot than any applicant interviewed, but was not hired because of the discriminatory act of Respondent.

In spite of the fact that the Respondent properly asserts that this position is an extremely important one, dealing with human lives as it does, the evidence does not show that the Respondent exercised extreme care in the selection of the applicants for the training school; on the contrary it was difficult, if not impossible to determine from the Respondent's testimony, although the witnesses were asked repeatedly, who was charged with the selection of the successful applicants. The evidence is conclusive on the basis of the testimony that the only reason that the Complainant was not selected for the training school was because of his race.

CONCLUSIONS OF LAW

The Commission assumes constitutionality of the law.

The Commission has jurisdiction to hear the complaint.

The Commission finds that there is a violation as charged in the complaint.

ORDERS

The Complainant has requested this Commission to withdraw his complaint. Rule 2 (j) of the Rules of the Commission provides with respect to withdrawal as follows: " * * * if the request for withdrawal is made after the case has been noted for hearing the written consent of a majority of the hearing examiners shall be obtained."

A majority of the hearing examiners have not consented to such withdrawal. Accordingly it is hereby ordered as follows:

The Respondent shall cease and desist from such discriminatory and unfair employment practice.

The Respondent shall give to the Complainant the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957.

In view of Complainant's request that his complaint herein be withdrawn, he is directed to advise this Commission in writing on or before January 10, 1959 of his willingness to enter the next pilot training course to be conducted by Respondent. In the event of Complainant's failure so to do the Respondent will be released of the obligation of the order entered herein to place him in such class. In the event Complainant elects within the time mentioned to enter such class, the Commission shall advise the Respondent of such election and thereupon such written advice to the Respondent shall be deemed the service of an order of the Commission pursuant to Section 6 of the Act, and Respondent shall be allowed thirty (30) days from the service of such order in which to file its statutory petition for review in the district court under the provisions of Section 7 of the Act.

The Commission retains jurisdiction of the matter under the provisions of the Act.

BY ORDER OF THE COMMISSION

s/ Roy M. Chapman
Coordinator

(Seal)

Appendix D

**IN THE DISTRICT COURT IN AND FOR THE
CITY AND COUNTY OF DENVER
STATE OF COLORADO**

Civil Action No. B-29648

CONTINENTAL AIR LINES, INC.,
Petitioner,

vs.

COLORADO ANTI-DISCRIMINATION
COMMISSION, and
EDWARD MILLER, MRS. PAUL BUD-
IN, CLARENCE C. BELLINGER, GENE
MANZANARES, ROBERT C. KEELER,
GEORGE J. WHITE, and GEORGE O.
CORY, Commissioners of said Commis-
sion, and
MARLON D. GREEN,

Respondents.

**FINDINGS OF FACT
CONCLUSIONS OF
LAW AND
JUDGMENT**

This matter coming on for review of the proceedings and Order of the Colorado Anti-Discrimination Commission in the matter of Marlon D. Green, Complainant vs. Continental Air Lines, Inc., Respondent, and the Court having reviewed the record, and having heard arguments of counsel, and having read the briefs of Mr. T. Raber Taylor, for Marlon D. Green, Complainant, Mr. Charles S. Thomas, for the Commission, and Messrs. Patrick M. Westfeldt, Mr. William C. McClearn, and Mr. Warren L. Tomlinson, of Holland & Hart, for Continental Air Lines, Inc.,

DOTH FIND:

That the Complainant, Marlon D. Green, filed a com-

plaint against Continental Airlines, Inc., on August 13, 1957, alleging, in substance, as follows:

1. That Continental Airlines violated the Colorado Anti-Discrimination Act of 1957 by refusing to employ him as an airline pilot on or about July 8, 1957, because he is a negro;

2. That Continental failed to notify him as to their acceptance or rejection of his application as an airplane pilot within 10 days, as promised; and

3. That Continental violated the Act because its forms contain at least two specifications prohibited by the Colorado Anti-Discrimination Act, vis.: attachment of photograph and requiring applicant to state his race.

The Commission, after a hearing, entered the following Order:

.....

The Respondent (Continental) shall give to the Complainant (Green) the first opportunity to enroll in its training school in its next course, and the priority status of the Complainant shall be fixed as of June 24, 1957."

Continental Airlines appealed from the ruling on several grounds, which the Court will hereinafter review.

The Colorado Legislature, in 1937, enacted the following law:

"1953 — C.S.A. 5-1-1: SHORT TITLE: This article is known and may be cited as 'The Aeronautics Act of 1937'."

"5-1-2 NAVIGATION OF AIRCRAFT: The public safety requiring and the advantages of uniform

regulation making it desirable in the interest of aeronautical progress that aircraft operating within this state should conform with respect to design, construction and airworthiness to the standards now, or hereafter to be prescribed by the United States government with respect to navigation of aircraft subject to its jurisdiction, it shall be unlawful for any person to navigate an aircraft within the state unless it is licensed and registered by the department of commerce of the United States in the manner prescribed by the lawful rules and regulations of the United States government then in force.

“5-1-3: LICENSE FOR NAVIGATION: The public safety requiring and the advantages of uniform regulations making it desirable in the interest of aeronautical progress that a person engaging within this state in navigating aircraft designated in section 5-1-2 in any form of navigation for which license to operate such aircraft would be required by the United States government shall have the qualifications necessary for obtaining and holding the class of license required by the United States government. It shall be unlawful for any person to engage in operating such aircraft within this state in any form of navigation unless he have such a license.

“

“5-1-8: INTERPRETATION: This article shall be so interpreted and construed as to effect its general purpose and to make uniform the law of those states which enact it and to harmonize as far as possible, with federal laws and regulations on the subject of aeronautics.”

This Court must recognize that as early as 1937, the Colorado legislature recognized federal laws and regulations on the subject of aeronautics.

The Colorado Anti-Discrimination Act of 1957 provides:

.. . . .

“(5) ‘Employer’ shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * * *”

It will be thus seen, from the above provision, that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce.

The evidence showed the Complainant, Green, received “an application blank” from Continental Airlines in San Francisco, at which time he was a citizen of Arkansas; he was interviewed in Denver; at the time he made a complaint, namely, August 13, 1957, he was a resident of the State of Michigan (folio 1), and he was not a licensed pilot under the federal law, nor under the Colorado Aeronautical Act, and did not become one until September 27, 1957 (folio 16), at which time he gave his residence as 734 South Smith Avenue, El Dorado, Arkansas.

It further appears that Green had filed complaints against United Airlines for unfair labor practices in the States of Washington, New York and the District of Columbia. In Michigan, he filed similar complaints against General Motors, Francis Aviation, and Abrams Aerial Survey Corporation. In Washington, D.C., Green filed similar complaints with the President's Committee on Gov-

erament Contracts against Capital Airlines and the Air Division of General Motors.

This Court has not been advised of the disposition of these complaints; nor is it important that it has not been so advised.

Continental Airline's first and second claims for relief, which attack the jurisdiction of the Commission and raise a constitutional issue, are directed to the same basic legal issue and may properly be considered together. The facts upon which this issue is predicated were the subject of a Court-approved stipulation between the parties and are as follows:

Continental is a commercial carrier by air, operating pursuant to a certificate of public convenience and necessity issued by the Civil Aeronautics Board. It provides air transportation for passengers, freight and United States mail between the states of Colorado, Texas, Oklahoma, New Mexico, Kansas, Missouri, Illinois and California. Continental was admittedly engaged in interstate commerce and it was further agreed that the position with Continental for which Respondent, Green, applied involved interstate operations. At the time of the hearing before the Commission, Continental employed approximately 220 pilots, of whom 90 to 95 were based in Denver. The other pilots were stationed in Texas. Notwithstanding these facts, the Commission asserted jurisdiction to hear and determine Respondent Green's complaint against Continental.

The constitutional issue presented in this case is not whether the State of Colorado had the general authority, pursuant to its police power, to enact the Colorado Anti-Discrimination Act. The question is whether the Act may

legally be applied to the interstate operations of Continental involved in this proceeding.

Continental maintains that the Act, as applied to it on the facts of this case, is unconstitutional and void under the provisions of Article 1, Section 8, Clause 3, of the United States Constitution, which reads as follows:

“The Congress shall have power . . . (Clause 3) To regulate Commerce with foreign Nations and among the several States and with the Indian Tribes; • • •”

Continental further contends that the United States Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (both generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field.

The applicable rules of law on the constitutional issues are:

(a) In those areas of interstate commerce which by their nature require uniformity of regulation by a single authority, the states are without power to act even though Congress has not legislated on the subject; and

(b) In areas of interstate commerce which do not require such uniformity of regulation and in which the states may act because the matters are of peculiar local concern, whenever Congress does, by legislation, occupy the field, the states are thereafter without power to act.

In either (a) or (b) above, an attempt by a state to

act is unconstitutional as a violation of the commerce clause of the United States Constitution and attempts of state agencies to apply such statutes are void and of no force and effect.

Congress has the power to regulate interstate commerce. *Article 1, Section 8, Clause 3, United States Constitution.* Early in the history of this country, the United States Supreme Court held that the power of Congress to regulate interstate commerce was supreme and plenary. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the Constitution." *Gibbons vs. Ogden*, 9 Wheat. 1, 196, 6 L.Ed. 23, 70 (1824). This rule has never been altered and is today fully applicable.

The power of the Congress over interstate commerce does not mean that the States are completely without power to legislate in that field. In another early case, the United States Supreme Court held that in the absence of federal legislation regulating a particular area of commerce, the States could legislate on matters of peculiar local concern if the impact on interstate commerce did not interfere with the operation of that commerce. *Cooley vs. Port Wardens of Philadelphia*, 12 How. 299, 13 L.Ed. 996 (1851). However, even when the Congress has not acted, States may not regulate matters which, because of their nature, require national uniform treatment. *Southern Pacific Co. vs. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945).

These rules were expressed as follows by the United States Supreme Court in the *Minnesota Rate Cases*, 230 U.S. 352, 33 S.Ct. 729 (1913):

The grant in the Constitution of its own force, that is, without action by Congress, established the essen-

tial immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has been repeatedly declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation." 33 S.Ct. at 740.

Although Congress has legislated extensively in the area of racial discrimination with reference to interstate air transportation and has thereby withdrawn this field from regulation by the several states, the Court will first consider whether racial discrimination by an interstate carrier is a subject which (a) must be free from diverse regulation by the several states and governed uniformly, if at all, by Congress, or (b) whether it is a matter of primarily local concern upon which the states can legislate until, but not after, Congress acts. The United States Supreme Court has clearly and directly ruled that this is a matter permitting only national action. Attempts by states either (a) to impose discrimination on account of race, or (b) prohibit such discrimination, have been held unconstitutional as applied to interstate carriers.

In *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547 (1877), the court had before it a Louisiana statute which prohib-

ited discrimination in passenger accommodations within the state. The defendaut, owner of a passenger steamship which traveled the Mississippi River between Louisiana and Mississippi, had refused certain accommodations to a Negro and was sued by her. The Court concluded that the statute as applied to those engaged in the transportation of passengers among the States was unconstitutional. The Court said:

“But we think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within. While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. . . .

“It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship.

Each state could provide for its own passengers and regulate the transportation of its own freight, regardless of the interest of others. Nay more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the River or its tributaries he might be required to observe one set of rules, and on the other, another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other side be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

The soundness of *Hall vs. DeCuir* was expressly reaffirmed by the United States Supreme Court in 1946. *Morgan vs. Virginia*, 328 U.S. 373, 66 S.Ct. 1050 (1946). Here a Virginia statute required segregation of white and colored passengers for both intra-state and interstate motor vehicle carriers. A negro passenger making an interstate trip challenged the validity of the statute as a burden on interstate commerce. The Court found that the statute, as applied to interstate carriers, was unconstitutional. The Court reaffirmed the doctrine of *Hall vs. DeCuir* in the following language:

:"The factual situation set out in preceding para-

graphs emphasizes the soundness of this court's early conclusion in *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 66 S.Ct. at 1057.

In conclusion, the Court said:

"It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid." 66 S.Ct. at 1058.

Mr. Justice Frankfurter, concurring in the Court's decision, stated:

"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, is controlling. Since it was decided nearly 70 years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the court.

"The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, whether such contradictory and confusing State laws concern racial commingling or racial segregation." 66 S.Ct. at 1059.

The rule first set forth in *Hall vs. DeCuir* and reaffirmed in *Morgan vs. Virginia*, namely, that state regulation of the racial policies of interstate carriers constitutes a burden on interstate commerce because this area demands a "single, uniform rule to promote and protect national travel" has been often approved and applied. For example, in *Chance vs. Lambeth*, 186 F.2d 879 (4th Cir. 1951), the Court held a regulation which required

segregation of interstate passengers on a railroad to be unconstitutional because it imposed a burden on interstate commerce. The Court said:

"In *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, the court held that a statute of Louisiana which required a carrier to give all persons traveling within the state upon public vehicles equal rights and privileges was an unconstitutional regulation of interstate commerce since otherwise each state would be at liberty to regulate the conduct of carriers while in its jurisdiction, resulting in great confusion and inconvenience and destroying the uniformity necessary to the operation of the carrier's business." 186 F.2d at 881.

Also following the rule of *Hall vs. DeCuir* and *Morgan vs. Virginia* are *Charles vs. Norfolk & Western Railway Co.*, 188 F.2d 691 (7th Cir. 1951); *Whiteside vs. Southern Bus Lines, Inc.*, 177 F.2d 949 (6th Cir. 1949); *William vs. Carolina Coach Co.*, 111 F.Supp. 329 (E.D.Va. 1952), aff'd 207 F.2d 408 (4th Cir. 1953).

In *Pryce vs. Swedish-American Lines*, 30 F. Supp. 371 (S.D.N.Y. 1939), plaintiff brought an action for damages against defendant shipline, alleging that it discriminated against her because of her color in violation of the New York civil rights law "while she was a passenger on defendant's vessel on a cruise from New York City to various South American ports and return." Defendant was a Swedish corporation and the vessel involved was under Swedish registry.

As one of two grounds for dismissing plaintiff's complaint, the Court said:

"There is, however, an even more compelling reason

for refusing to apply Sections 40 and 41 of New York Civil Rights Law to the facts set forth in the second cause of action. To do so, would in effect be construing the statute as forbidding discrimination between passengers on the part of common carriers engaged in commerce between the port of New York and foreign ports. If construed in such a manner, the statute undoubtedly would illegally interfere with foreign commerce. See *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547." 30 F.Supp. at 372.

The *Pryce* case is a clear holding that to apply a state law forbidding racial discrimination to interstate or foreign commerce constitutes an unlawful interference with that commerce.

The important point is that the foregoing cases stand for the proposition that the question of racial discrimination by interstate carriers is, in and of itself, of such a nature that uniform regulation by a single authority is required. The burden on commerce lies in subjecting interstate carriers to the law-making powers of the legislatures in the several states through which such carriers move. The foregoing cases and others show the practical obstructions and burdens that result from such diversity of regulatory power. The diversity of this regulatory power is the burden on interstate commerce which is unconstitutional.

All of the states of the United States are sovereign within constitutional limits. What any particular state law is today or what it may be tomorrow, and whether or not any one or more of such states have any laws on the subject is of no significance. If an interstate carrier is subject to the regulatory power of all of the states through

which it passes, it is automatically subject to non-uniform regulation. Such non-uniform regulation is what the United States Supreme Court has held to be barred by the commerce clause.

Respondent, Green, relies principally upon two cases, which the Court will discuss.

In *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 68 S.Ct. 358 (1948), a conviction under a Michigan civil rights statute was upheld. Defendant had refused to permit a Negro on its excursion boat which traveled between Detroit, Michigan, and Bois Blanc Island, a small island in the Detroit River about 15 miles from Detroit. Bois Blanc Island, which was almost entirely owned in fee by defendant and was used by it as an amusement park, was technically across the international boundary in Canada. However, there was no access to the island from Canada or in any way other than on defendant's excursion boat. The opinion does not indicate that defendant held a certificate of public convenience and necessity from any federal agency. Based upon these facts it was held that defendant's conviction under the Michigan statute did not violate the commerce clause in the United States Constitution. But the Court carefully limited its holding to the unusual facts before it, saying, in part:

"Of course, we must be watchful of state intrusion into intercourse between this country and one of its neighbors. But if any segment of foreign commerce can be said to have a special local interest, apart from the necessity of safeguarding the federal interest in such matters as immigration, customs and navigation, the transportation of appellant's patrons falls in that characterization. It would be hard to find a substan-

tial business touching foreign soil or more highly local concern." 68 S.Ct. at 361-62.

In addition, the Court took pains to carefully distinguish the unique *Bob-lo* situation from the doctrine established by the *Morgan* and *Hall* cases. It said:

"Appellant hardly suggests that the power of Congress over foreign commerce excludes all regulation by the states. But it verges on that view in regarding *Hall vs. DeCuir*, 95 U.S. 485, 24 L.Ed. 547, supplemented by *Morgan vs. Virginia*, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317, 165 A.L.R. 574, and *Pryce vs. Swedish-American Lines*, D.C., 30 F.Supp. 371, as flatly controlling this case. We need only say that no one of those decisions is comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating affects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties. None involved so completely and locally insulated a segment of foreign or interstate commerce. In none was the business affected merely an adjunct of a single locality or community as is the business here so largely. And in none was a complete exclusion from passage made. The *Pryce* case, of course, is not authority in this Court, and we express no opinion on the problem it presented. The regulation of traffic along the Mississippi River, such as the *Hall* case comprehended and of interstate motor carriage of passengers by common carriers like that in the *Morgan* case, are not factually comparable to this regulation of appellant's

highly localized business, and those decisions are not relevant here." 68 S.Ct. at 363-364.

It is thus quite clear that the U. S. Supreme Court did not intend to detract from nor diminish the doctrine of *Morgan and Hall*. It is equally apparent that the facts in the present case, involving frequent high-speed air transportation between eight states pursuant to certification from the Civil Aeronautics Board, are much more akin to the transportation involved in *Morgan and Hall* than to the highly local, non-commercial traffic with which *Bob-lo* was concerned.

During oral argument before this Court, Respondent, Green, indicated primary reliance upon *Railway Mail Association vs. Corsi*, 326 U.S. 88, 65 S.Ct. 1483 (1945). The *Corsi* case did not in any way involve the commerce clause of the U. S. Constitution. *Corsi*, interpreted most favorably to Respondents, only held neither the due process clause of the 14th Amendment, nor the equal protection clause, nor the clause conferring authority over postal matters upon Congress prevented a state from adopting a civil rights statute. The application of such a statute to interstate commerce was neither raised nor discussed nor decided.

There is perhaps less permissible state regulation of interstate transportation than any other area of commerce. The characteristics of interstate transportation, namely, definite, regular and frequent contacts with numerous states, require that many aspects of interstate transportation be left free from state regulation. The speed and complexity of long-distance air transportation renders it even less susceptible to state regulation than the river

boat travel involved in *Halt vs. DeCuir*, or the motor vehicle transportation in *Morgan vs. Virginia*.

The foregoing cases hold that the states may not regulate the racial policies of the interstate operations of carriers, and they are consistent with a body of law regulating interstate commerce which has been developed and uniformly applied for nearly 150 years.

In *Southern Pacific Co. vs. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945), the Supreme Court declared unconstitutional the Arizona Train Limit Law which prescribed the maximum number of passenger and freight cars for trains operating in the state. The Court reiterated familiar rules when it said:

"But ever since *Gibbons vs. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need for national uniformity, demand that their regulation, if any, be prescribed by a single authority." 65 S.Ct. at 1519.

In holding the law unconstitutional, the Court said:

"Enforcement of the law of Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter

each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers' operations both within and without the regulating state." 65 S.Ct. at 1522.

The Court clearly recognized that the Arizona law would of necessity affect operations in other states when it said:

"The practical effect of such regulation is to control train operations beyond the boundaries of the state exacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and before leaving the regulating state." 65 S.Ct. at 1523.

In *Southern Pacific Co. vs. Marie Jensen*, 244 U.S. 205, 37 S.Ct. 524 (1917), the Supreme Court held that New York Workmen's Compensation Laws could not be applied to stevedores working in the maritime industry. The Court drew a parallel between federal power over maritime matters and federal power over interstate transportation, referring to the latter in the following language:

"A similar rule in respect to interstate commerce, deducted from the grant to Congress of power to regulate it is now firmly established. 'Where the subject is national' in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration

that commerce in that matter shall be free." 37 S. Ct. 529.

Many state attempts to regulate interstate transportation operations have been struck down by the United States Supreme Court. A state statute requiring the use of a contour type of rear fender mudguard on interstate trucks conflicted with the commerce clause and was unconstitutional. *Bibb vs. Navajo Freight Lines, Inc.*, 359 U.S. 520, 79 S.Ct. 962 (1959). A state statute requiring interstate trains to greatly reduce their speed at grade crossings was found to be a burden on interstate commerce. *Seaboard Air Line Railway Co. vs. Blackwell*, 244 U.S. 310, 37 S.Ct. 640 (1917). A state was without constitutional power to order a railroad to remove bridges over which its interstate trains passed even though the bridge removal was a part of the State's flood control program. *Kansas City Southern Ry. Co. vs. Kaw Valley Drainage District*, 233 U.S. 75, 34 S. Ct. 564 (1914). Burdensome intrastate stops by interstate trains cannot be demanded. *Herndon vs. Chicago, Rock Island & Pacific Ry. Co.*, 218 U.S. 135, 30 S.Ct. 633 (1910); *St. Louis-San Francisco Ry. Co. vs. Public Service Commission*, 261 U.S. 369, 43 S.Ct. 380 (1923). A state may not require that interstate trains leave their scheduled stops on time. *Missouri, K. & T. Railway Co. vs. Texas*, 245 U.S. 484, 38 S.Ct. 178 (1918). And a local ordinance regulating the maximum number of passengers per car and the minimum number of cars required for a street railway company operating between cities in two states was invalid. *South Covington and Cincinnati Street Railway Co. vs. Covington*, 235 U.S. 537, 35 S.Ct. 158 (1915). In this case, the Court said:

"If Covington (a city in Kentucky) can regulate these

matters, then certainly Cincinnati (in Ohio) can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in *Hall vs. DeCuir*, 95 U.S. 485, 489, 24 L.Ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments.' 35 S.Ct. at 161.

Thus, an unbroken line of United States Supreme Court cases over a period of nearly 150 years has established that the national power over interstate commerce is supreme and plenary; that even when Congress has not acted the states will not be permitted to regulate this commerce in areas in which a uniform rule is needed because diversity of regulatory power creates an unconstitutional burden, that the racial policies pertaining to the interstate operations of carriers is an area in which a uniform rule is needed and only Congress can legislate, and that this, among many other aspects of interstate transportation, must remain free from regulation by the states.

Congress has regulated the activity involved in this case and thereby pre-empted the field, leaving the state without authority to act. The applicable rules concerning pre-emption are set forth in *Kelly vs. State of Washington*, 302 U.S. 1, 58 S.Ct. 87 (1937):

"The state court took the view that Congress had occupied the field and that no room was left for state action in relation to vessels plying on navigable waters within the control of the federal government.

"This argument, invoking a familiar principle, would be unnecessary and inapposite if there were a direct conflict with an express regulation of Congress acting within its province. The argument presupposes the absence of a conflict of that character. The argument is also unnecessary and inapposite if the subject is one demanding uniformity of regulation so that state action is altogether inadmissible in the absence of federal action. In that class of cases the Constitution itself occupies the field even if there is no federal legislation. The argument is appropriately addressed to those cases where states may act in the absence of federal action but where there has been federal action governing the same subject." 58 S.Ct. at 91.

The Court stated that the doctrine of pre-emption is not applicable where there is a direct conflict between state law and federal law. In such a case the federal law is the supreme law of the land. In addition, the Court in the *Kelly* case pointed out that the pre-emption rule is inapplicable if the subject is one demanding uniformity of regulation.

By virtue of any one of several federal statutes and regulatory systems, an interstate air carrier is prohibited from racial discrimination. As to those employers, federal legislation pre-empts the field.

The Railway Labor Act prohibits racial discrimination. The Railway Labor Act (45 U.S.C.A. Sections 151, et seq.) hereinafter referred to as the R.L.A.), which was extended to cover interstate air carriers by a 1936 amendment (45 U.S.C.A., Sections 181, et seq.), is a comprehensive federal statute prescribing the duties of interstate air carriers with respect to their employees. There is no

specific, detailed section of the R.L.A. which specifically treats the matter of racial discrimination. However, the United States Supreme Court has considered the provisions of the R.L.A. and has clearly held that racial discrimination by employers subject thereto is forbidden.

The latest pronouncement by the Supreme Court on this point came in *Conley vs. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). Petitioners were Negro railway employees who contended that the union had failed to represent them equally and in good faith and had failed to protect them from unjustified discharge and loss of seniority. The Court expressed its interpretation of the statute in clear terms in the opening words of its opinion:

"Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with *Steele vs. Louisville & Nashville R. Co.*, 323 U.S. 192, 65 S.Ct. 226, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the courts have power to protect employees against such invidious discrimination." 78 S.Ct. at 100.

The Court went on to say:

"Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad, and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there

has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. This Court squarely held in *Steele* and subsequent cases that discrimination in representation because of race is prohibited by the Railway Labor Act. 78 S. Ct. at 102.

In *Steele vs. Louisville & Nashville RR.*, 323 U.S. 192, 65 S.Ct. 226 (1944), referred to above as the leading case in this field, the Court said:

"We think that the Railway Labor Act impose upon the statutory representative of the craft at least as exacting a duty to protect equally the interests of the members of the craft as the constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates . . . We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of the craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

See also *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210, 65 S.Ct. 235 (1944); *Graham vs. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232, 70 S.Ct. 14 (1949).

The scope of these holdings by the Supreme Court is made clear by *Brotherhood of Railroad Trainmen vs. Howard*, 343 U.S. 768, 72 S.Ct. 1022 (1952). Whereas in the *Steele* case the Negro petitioners had admittedly been members of the craft (locomotive firemen) but had not.

been members of the union (because membership was denied to them on account of race), in *Howard* "the colored employees had for many years been treated by the carriers and the Brotherhood as a separate class for representation purposes and have in fact been represented by another union of their own choosing." 72 S.Ct. at 1025. However, it was alleged that the Brotherhood, under a threat of strike action, forced the employer to enter into a collective bargaining agreement which would have the inevitable result of abolishing the Negroes' jobs and replacing them with Brotherhood members. By this action the union was in effect forcing the employer, an interstate rail carrier, to discriminate against Negro porters in the tenure of their employment. This is exactly the same field of law covered by the Colorado Act. The U.S. Supreme Court brushed aside the plea to restrict its earlier holdings to instances of discrimination by the union against members of the class it represented with the following language:

"Since the Brotherhood has discriminated against 'train porters' instead of minority members of its own 'craft', it is argued that the Brotherhood owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads. We think this argument is unsound and that the opinion in the *Steele* case points to a breach of statutory duty by this Brotherhood.

"As previously noted, these train porters are threatened with the loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement: their color alone would disqualify them for the

old job under its new name. The end result of these transactions is not in doubt; for precisely the same reasons as in the Steele case 'discriminations based on race alone are obviously irrelevant and invidious.'" 72 S.Ct. at 1025.

And finally the Court held that the employer as well as the union was subject to the duty and obligation to treat its employees without discrimination based on race by permanently enjoining the railroad as well as the union from using the contract or any other device to oust the Negro porters from their jobs. This portion of the Court's opinion reads:

"On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." 72 S.Ct. at 1026.

It is, of course, not material that the public policy or objectives behind both the federal and the Colorado legislation are similar. As stated by Mr. Justice Holmes, speaking for the Court in *Charleston & Western Carolina Ry. vs. Varnville Furniture Co.*, 237 U.S. 597, 35 S.Ct. 715 (1915):

"When Congress has taken the particular subject matter in hand, coincidence (of state regulation) is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 35 S.Ct. at 717.

See also *Wabash Railway Co. vs. Illinois*, 118 U.S. 557, 7 S.Ct. 4 (1886), where a state's attempt to prevent discriminatory railway rates was struck down because it was

a subject of "general and national character", even though federal regulation would not sanction discriminatory railway rates either.

In summary, the Supreme Court decisions over a number of years require nondiscriminatory representation by labor unions. In addition, the Supreme Court in the *Howard* case clearly held that the R.L.A. requires the same nondiscriminatory treatment by an interstate rail carrier employer with respect to its employees. Hence, the R.L.A., as interpreted by the United States Supreme Court, occupies the field of law relating to discrimination in matters of employment by interstate rail and air carriers.

Such pre-emption necessarily precludes any attempt by Colorado, as in the instant case, to extend its regulatory activities in the field to the interstate operation of an air carrier.

The Civil Aeronautics Act prohibits racial discrimination. Not only has the field of racial discrimination by interstate air carriers been pre-empted by the R.L.A., but it is also covered by the Civil Aeronautics Act, hereinafter referred to as the C.A.A., 49 U.S.C.A. Sections 401, et seq. It should be noted that in 1958, the C.A.A. was repealed and replaced with a new statute known as the Federal Aviation Program Act, hereinafter referred to as the F. A.P.A., 49 U.S.C.A. (Supp.) Sections 1301, et seq. However, the effective date of the F.A.P.A., insofar as it supersedes the earlier provisions of the C.A.A. applicable to this case, was not earlier than December 31, 1958. (See annotation following 49 U.S.C.A. (Supp.) Section 1301.) Respondent Green's complaint against Continental, which was filed with the Commission on or about August 13,

1957, referred to acts which allegedly occurred in June and July of 1957. As a consequence, the C.A.A. and not the F.A.P.A. was in effect during all times material to this action.

The Civil Aeronautics Act regulates practically every phase of an interstate air carrier's operations. The public policy of this act is set forth in the broadest terms, 49 U.S.C.A. Section 402. Extensive control is exercised over flight crew personnel. 49 U.S.C.A. Sections 551-560. Such employees are licensed or certified by the Civil Aeronautics Board, and that Board may under certain circumstances revoke or suspend certificates or licenses. The disciplinary power of the Board over flight crew personnel is very broad. For instance, the Civil Aeronautics Board has the power to suspend or revoke pilots' certificates for bad judgment even though the pilot violated no statute, rule or regulation. *Hard vs. CAB*, 248 F.2d 761 (7th Cir. 1957); *Wilson vs. CAB*, 244 F.2d 773 (D.C. App. 1957). The statute delegates extensive power to the Board, including the power to conduct investigations and issue orders, rules and regulations. 49 U.S.C.A. Section 425. Pursuant to that power, the Board regularly issues orders and has promulgated a large volume of rules and regulations touching practically all phases of interstate air carriage. 14 Code Fed. Regs.

The "intensive and exclusive" control of the Federal Government over air commerce was discussed by the United States Supreme Court in *Northwest Airlines, Inc. vs. Minnesota*, 322 U.S. 292, 64 S.Ct. 950 (1944). The following language from the concurring opinion of Mr. Justice Jackson is particularly illuminating:

"Congress has recognized the national responsibility

for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection in the hands of federally certificated personnel and under an intricate system of federal commands." 64 S.Ct. at 956.

In *Allegheny Airlines, Inc. vs. Village of Cedarhurst*, 132 F.Supp. 871 (E.D.N.Y. 1955), the Court had before it the specific contention that the federal statutes had pre-empted one aspect of air commerce. The Village of Cedarhurst, located near Idlewild Airport in New York, enacted an ordinance prohibiting air flights above the city at an altitude of less than 1,000 feet. In holding the Cedarhurst ordinance unconstitutional, the Court said:

"The plaintiffs' contention that the legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute pre-emption in that field is upheld. The States, including the Village of Cedarhurst, are thus precluded from enacting valid contrary or conflicting legislation." 132 F.Supp. at 881.

In *Fitzgerald vs. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956), the plaintiffs alleged that they were denied first-class passage on one of defendant's airplanes because of their race and that such conduct violated the Civil Aeronautics Act, 49 U.S.C.A. Section 484 (b), which provided in part as follows:

"No air carrier . . . shall . . . subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any

undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

The Court held that this section prohibited racial discrimination by interstate air carriers and that it created an actionable civil right for the vindication of which the person harmed could bring a federal court action. The Court said:

“Although we regard it as not controlling, we note also the following: *Congress sought uniformity in the practices of those subject to this Act.* It is by no means clear that, in all states and territories, the common-law rules would render unlawful racial differentiations in accord with the ‘separate but equal doctrine,’ whereas, in the light of recent Supreme Court decisions, we must construe Section 484(b) so that that doctrine will not apply.” 299 F.2d at 502.

The language underlined in the last quoted portion of the *Fitzgerald* case shows that Congress considered uniformity in practices of interstate air carriers to be necessary. This is in effect both a legislative and judicial interpretation to the effect that uniform rather than diverse regulation is necessary.

The *Fitzgerald* case is also a clear holding that racial discrimination in interstate air commerce is prohibited by federal law. Although the case itself involved discrimination against a passenger, there can be no doubt that the same rule would apply to discrimination in matters of employment. The statute condemns “unjust discrimination” against “any . . . person” by an air carrier. “Person” certainly includes employees. Moreover, a subsequent case approved the broad interpretation which was given to section 484(b) by the Court in the *Fitzgerald* case.

case. Judge Lombard, concurring in *Spirit vs. Bechtel*, 232 F.2d 241 (2d Cir. 1956), made the following comments:

"The authorities cited by our dissenting colleague are not in point, it seems to me, because in those cases there was good reason to believe, and this court found, that Congress was enacting legislation for the benefit of a class. The court therefore concluded that the right of a member of the protected class to bring a civil suit should flow from the legislation. A clear case of this is our recent decisions in *Fitzgerald vs. Pan American World Airways, Inc.*, 229 F.2d 499. We were there concerned with 49 U.S.C.A. Sec. 484(b) which protects against unjust discrimination by air carriers. The plaintiffs were persons allegedly harmed by unjust discrimination and were clearly within a class which Congress sought to protect." 232 F.2d at 250.

In interpreting the Interstate Commerce Act, which contains language practically identical to the portion of the C.A.A. discussed in the *Fitzgerald* case, the U. S. Supreme Court, in *Mitchell vs. United States*, 313 U.S. 80, 61 S.Ct. 873 (1941), stated among other things, as follows:

"We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. (Citations omitted.) Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act to sub-

ject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' 49 U.S.C. Section 3, 49 U.S.C.A. Section 3. From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers. 61 S.Ct. at 877.

There are other reasons why it can only be concluded that the federal aeronautics statutes prohibit racial discrimination by interstate air carriers and therefore leave the states without authority to act in this field. The section setting forth the declaration of policy in the federal statute reads in material part as follows:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity —

• • •

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;" 49 U.S.C.A. Section 402.

If anything, this section, which sets forth the objectives which Congress sought to achieve by the Act, is even more

specific than the section held in the *Fitzgerald* case to prohibit racial discrimination.

In addition, as noted earlier herein, the original Civil Aeronautics Act was repealed and re-enacted, with amendments, as the Federal Aviation Program Act. 49 U.S.C.A. (Supp.) Sections 1301, et seq. The section held in the *Fitzgerald* case to prohibit racial discrimination by interstate air carriers (49 U.S.C.A. Section 484(b)) was re-enacted without one word being changed. 49 U.S.C.A. (Supp.) Section 1374(b). It is a well-known rule that when a legislative body enacts without change a statute which has been judicially construed, the legislature is deemed to have approved and adopted the construction placed upon that act by the courts.

The *Fitzgerald* case is in accord with other decisions construing similar language in the federal statutes regulating other modes of interstate transportation. In *National Association for Advancement of Colored People vs. St. Louis-San Francisco Rwy Co.*, ICC No. 31423, 1 Race Rel. Law Rep. 263 (1956), the Interstate Commerce Commission ruled that the statute under which it functions prohibited passenger segregation on interstate rail travel. The Commission said:

"The complainants invoke our authority to prevent violations of section 3(1), which makes it unlawful for a rail carrier 'to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' The disadvantage to a traveler who is assigned accommodations or facilities so designated as to imply his inherent inferiority solely because of his race must be regarded under present conditions as unreasonable."

See also *Keys vs. Carolina Coach Co.*, ICC No. MC-C-1564, 1 Race Rel. Law Rep. 272 (1956), where the Commission ruled that racial discrimination in bus transportation was prohibited by the applicable federal statute. The statutory language involved in this case was exactly the same as that found in the C.A.A. and given the same construction in the *Fitzgerald* case.

The comprehensive scope of federal legislation with respect to interstate air carriers is obvious. When the pervasiveness of federal regulation of the industry generally is considered in connection with the specific federal laws and regulations (and the cases interpreting those laws and regulations) prohibiting racial discrimination by interstate air carriers, there can be no doubt but that federal law has covered the subject matter involved herein and leaves no room for the application of Colorado Law.

Executive orders prohibit discrimination by Government contractors. This is yet another federal regulatory system which covers racial discrimination by Petitioner and others similarly situated. By Executive Order 10479, August 13, 1953, the President established the Government Contracts Committee. The purpose of the committee is to prevent persons contracting with the federal government from discriminating on account of "race, creed, color or national origin." The committee recommended, and the President ordered in Executive Order 10557, September 3, 1954, that the following clause be included in all contracts executed by the contracting agencies of the federal government:

"In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment

because of race, religion, color or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of the non-discrimination clause."

As a certificated commercial carrier by air, Petitioner is obligated to and in fact does transport United States mail under contract with the United States Government. 49 U.S.C.A. Section 485(a), 49 U.S.C.A. (Supp.) Section 1375. Therefore, Continental remains constantly in the status of one contracting with the federal government and subject to the non-discrimination policy required of such contractors. Specifically, Continental is prohibited from discriminating against "any employed or applicant for employment" because of race "in connection with the performance of any work" under government contracts. Obviously, members of flight crews are engaged in the performance of work in connection with transporting the mail. Again, federal regulation occupies the field.

If federal law occupies a field, it does so exclusively and it is immaterial whether or not the federal power is exercised. Perhaps the outstanding example of this principle is *Guss vs. Utah Labor Relations Board*, 353 U.S. 1, 77 S.Ct. 598 (1957). The Court held in effect that where the matter of prevention of unfair labor practices affecting commerce had been occupied by the National Labor Relations Act, the occupation was exclusive and barred

state action pursuant to state law, notwithstanding the fact that the NLRB had refused to act in the specific matter because of jurisdictional yardsticks established by it. The case is famous because the Court was fully aware of the so-called no man's land which existed where the federal government had jurisdiction but refused to act and the state government could not act. Nevertheless, Federal law "pre-empted" the field and the state was powerless to act.

To the same effect is *San Diego Building Trades Council vs. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). The Court there held that state labor law could not enter fields which might arguably (though not definitely) be covered by the federal labor act. Several statements made by the Court indicate the breadth of the doctrine of pre-emption and the restrictions placed upon the extension of state law into areas covered by federal law:

"In the light of these principles, the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the State's jurisdiction is displaced.

• • •

"Even the States' salutary effort to redress private wrongs or grant compensation for past harms cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 79 S.Ct. at 780.

These recent United States Supreme Court decisions delineate the scope of the pre-emption doctrine. The Rail-

way Labor Act, the Civil Aeronautics Act and the Executive Orders pertaining to Government Contractors all deal directly and forcefully with racial discrimination by interstate air carriers. Hence, Colorado's racial policies may not be extended to this area.

In conclusion, the Court finds that the Colorado Act may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier.

Accordingly, the findings of the Colorado Anti-Discrimination Commission are set aside, and the Complaint of Mahlong D. Green is dismissed.

The Court orders that a Motion for a New Trial be dispensed with, and if filed, would be overruled.

Dated this 7th day of January, A.D. 1961.

BY THE COURT:

/s/ William A. Black
District Judge

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IN THE
Supreme Court of the United States
October Term, 1962

No. 4001

146

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND ED-
WARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE,
AND GEORGE O. COBY, as members of said Commission,
Petitioners,

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

No. 1325 Misc.

MARLON D. GREEN, *Petitioner,*

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE
Supreme Court of the United States

October Term, 1961

No. 1001

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND ED-
WARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE,
AND GEORGE O. CORY, as members of said Commission,
Petitioners,

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

No. 1325 Misc.

MARLON D. GREEN, *Petitioner,*

v.

CONTINENTAL AIR LINES, INC., *Respondent.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Colorado (Comm.
Pet. App. A, 20-48; Green Pet. App. D, 1-20) is reported
at 368 P.2d 970.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on February 13, 1962 (637). Timely petitions for rehearing were filed by Petitioners herein on February 21, 1962 (Colorado Anti-Discrimination Commission) (670) and February 28, 1962 (Marlon D. Green) (675). The original opinion of the court below was modified on rehearing and, as modified, adhered to by order of court dated March 5, 1962 (678). The jurisdiction of this Court is invoked by Petitioners under 28 U.S.C.A. § 1257(3) upon allegations that the validity of a state statute is drawn into question on the grounds of repugnancy to the Constitution and laws of the United States (Comm. Pet. 2; Green Pet. 3). Respondent submits that this Court lacks jurisdiction under 28 U.S.C.A. § 1257(3) because the opinion of the court below rests upon an adequate and independent non-federal ground. Moreover, it is Respondent's position that even if the requisites for jurisdiction under 28 U.S.C.A. § 1257(3) are technically present, the proceedings below fail to tender the constitutional issue sought to be reviewed in such form as to render it ripe for decision by this Court. Respondent's jurisdictional arguments are fully set forth, *infra*, pp. 12-18.

QUESTIONS PRESENTED

1. Whether the decision below rests upon an adequate and independent non-federal ground where, in addition to discussion of federal questions by the Supreme Court of Colorado, that court (1) affirmed the decision of the trial court without reservation and approved the trial court's findings and conclusions, and (2) the decision of

the trial court specifically held "... that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce."

2. Whether this Court should exercise jurisdiction, even if the technical requirements of 28 U.S.C.A. § 1257(3) are met, where the constitutional issues presented to this Court are not presented in clear-cut and concrete form, unclouded by serious problems of construction relating to the terms of the questioned legislation and its interpretation by the state court because (1) the opinion below indicates the decision was based at least in part upon a non-federal ground, and (2) the court below, having decided the Commission lacked jurisdiction over Respondent, has not passed upon other questions raised by Respondent relating to the terms of the questioned legislation and its interpretation and application under the constitution and laws of the State of Colorado.

3. Whether the Commerce Clause of the United States Constitution bars the application of the Colorado Anti-Discrimination Act of 1957 to an interstate air carrier with respect to its flight crew personnel.

4. Whether either the Civil Aeronautics Act (now the Federal Aviation Program Act) or the Railway Labor Act prohibit racial distinctions by interstate air carriers as to flight crew personnel engaged in interstate operations and pre-empt that field, thereby precluding application of the Colorado Anti-Discrimination Act of 1957.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are adequately set forth in the petition of the Colorado Anti-Discrimination Commission (Comm. Pet. 3).

STATEMENT

In the court below the Colorado Anti-Discrimination Commission, the individual members thereof (herein collectively referred to as the "Commission") and Marlon D. Green were plaintiffs in error. Separate petitions have been filed in this Court by Green, Petitioner in No. 1325 Misc., and by the Commission, Petitioner in No. 1001. This brief is filed by Continental Air Lines, Inc., defendant in error below, in opposition to both such petitions. References to the consolidated record will be by page number without further identification.

Continental is a commercial carrier by air, certificated by the Civil Aeronautics Board, and engaged in the business of transporting freight, passengers and United States mail. It serves eight states from Illinois to California. The Commission is an administrative agency of the State of Colorado operating under the provisions of the Colorado Anti-Discrimination Act of 1957, 1953 Colo. Rev. Stat. 80-24-1 et seq. (1960 Perm. Supp.).

These proceedings were commenced when Green lodged a complaint with the Commission in which he alleged (1) that he had been denied employment as a pilot by Continental because he was a Negro, (2) that Continental had failed to advise him as to action taken on his application for employment, and (3) that Continental's application

form violated the Act in two particulars, viz., by containing a space for the race of the applicant to be indicated, and by requesting each applicant to submit a photograph with the application form (165). Continental's answer admitted that applicants were requested to furnish a photograph, denied that such request was for a discriminatory or illegal purpose, and denied each of the other material allegations in Green's complaint. It also, as acknowledged by the petitions herein of both the Commission and Green, challenged at the outset (a) the jurisdiction of the Commission over the subject matter of the complaint, and (b) the power of the Commission to regulate Continental's interstate operations (174-75).

The Commission held a hearing on the issues raised by Green's complaint and Continental's answer and thereafter entered certain findings of fact and conclusions of law, in which it "assumed" the constitutionality of the Act, asserted jurisdiction over the subject matter, and entered orders adverse to Continental (509). In accordance with 1953 Colo. Rev. Stat. 80-24-8 (1960 Perm. Supp.) which provides for judicial review of orders entered by the Commission, Continental filed a complaint and petition to review in the Denver District Court. The District Court, in the first of several hearings, held that the Commission had failed to make findings on a number of key issues, including certain issues pertaining to Continental's defense based upon the interstate character of its flight operations. The action was accordingly remanded to the Commission for additional findings on specified issues (44).

The Commission, however, failed to heed the mandate of the District Court. Instead, it ruled that its December 1958 order was at least partially "defective" (531), or,

as counsel for the Commission phrased it in open court, it "was not, in fact, an order" (113). Thereupon, the Commission purportedly "withdrew" its first order, and upon its own motion and without notice to the parties or a hearing of any kind, issued an entirely new "Decision" which differed substantially in scope, form and substance from the first order (526-544). This unique procedural action of the Commission ultimately led to the initial review of this case by the Supreme Court of Colorado, which held that the attempt to enter substituted findings and orders was in excess of the Commission's jurisdiction and void. The action was returned to the Denver District Court with instructions to pass upon the merits of the dispute. Green Pet. App. C; 143 Colo. 590, 355 P.2d 83 (1960).

The petitions of the Commission and Green convey the erroneous impression that the only issue of substance litigated in this proceeding concerned the effect of the Commerce Clause on the Commission's attempted regulation of Continental. The converse is true. While Continental's second claim alleged that the United States had, by various statutes and regulations, exercised exclusive jurisdiction and control over the operations of interstate air carriers, and asserted that attempted state regulation constituted an impermissible burden on commerce (7), its first claim was based on the premise (a) that the Commission was without jurisdiction over the subject matter of the proceeding, and (b) that the Commission had purported to act in excess of the jurisdiction conferred upon it by the Act (6-7).

It is also important to note that Continental vigorously challenged the sufficiency of the evidence to support

the Commission's findings. It was not disputed that Continental interviewed 14 pilot applicants in June 1957, of whom six, including Green, were found qualified to undergo the Company's flight training program. Of the six found to be so qualified, four were enrolled in the July training class. The names of Green and the sixth man were retained as qualified applicants eligible for employment (327) and Green was so advised (251). His name was withdrawn from Continental's list of qualified applicants only after it was learned that he had embarked upon a series of suits against other employers.¹ Continental believed that involvement in such other proceedings would have materially hindered his flight training. Moreover, because of the importance to its business of the impression of stability conveyed by its pilots, it was Continental's policy not to hire, or to retain pilots who became involved in public controversy (328-29, 345).

The only evidence which could arguably be said to support Green's complaint came from agents of the Commission who testified as to conversations with a Continental vice president. During one of these conversations the Continental representative, speaking as an individual, mentioned certain possible adverse effects which could be occasioned by the employment of a colored pilot by any airline. Continental, while denying that these statements indicated a discriminatory purpose, asserted that they had been made during an attempted conciliation and compromise and were privileged and thus inadmissible, both by agreement and by statute.

In addition to its attack on the jurisdiction of the

¹See opinion of the trial court (Comm. Pet. App. D, 59-60).

Commission over these proceedings, Continental raised serious constitutional objections to the manner in which the hearing and post-hearing procedures were conducted. Although Green's complaint was set for hearing before the entire Commission sitting as hearing examiners, the actual proceedings were conducted before varying groups of commissioners. Only five of the seven commissioners were present at any time during the first day of the hearing, only three commissioners were present at any time during the second day of the hearing, and only two of the commissioners were present during the entire proceedings. One of the commissioners attended only the hearing session during which Green testified on direct examination (235). Although the Commission's own rules and regulations require the hearing examiners to submit findings of fact and the basis therefor to the Commission (Rule 11(a), 523), no such findings were made in this case. Instead, the entire Commission, including those members who were never present as well as those who attended only portions of the hearing, purported to make credibility evaluations and enter findings of fact and conclusions.

As merely one example of the utter disregard of the Commission for the due processes of law, it found that in June 1957 Continental violated the regulations of the Commission by asking Green for a photo to be attached to his employment application (507) when in fact the regulations allegedly violated were not promulgated until November 1957. Similarly, although the Colorado Administrative Code specifically prohibits an officer who presides ~~at an~~ administrative hearing from engaging in the performance of either an investigative or prosecuting function in the same matter (1953 Colo. Rev. Stat. 3-16-4(6) (1960 Perm.

Supp.), the chairman of the Commission who presided at the Commission hearing on Green's complaint against Continental (176), found no impropriety in subsequently appearing before the Supreme Court of Colorado as a Special Assistant Attorney General to prosecute the Commission's appeal against Continental. 143 Colo. 590, 591, 355 P.2d 83 (1960).

The hearing on Green's complaint was held on May 7 and 8, 1958. It is significant that neither the Commission itself nor any commissioner filed a complaint in this case as they are permitted to do under the Act. 1953 Colo. Rev. Stat. 80-24-7(1) (1960 Perm. Supp.). The only matter before the Commission was the complaint of Green, a private individual.

On December 14, 1958, before the Commission had entered an order of any kind with respect to Green's complaint, Green sent the following telegram to the Commission with a copy to Continental:

"Urgently request withdrawal of my complaint against Continental Air Line. Signed, Marlon D. Green." (15)

Notwithstanding this emphatic telegram, the Commission, on December 19, 1958, entered its initial decision in which it stated, without giving any reason therefor, that the hearing examiners refused to consent to the withdrawal and pursuant to which Green was given an option to take advantage of the order against Continental (509). He subsequently elected to do so.

The validity of the regulation by which the Commission attempted to limit Green's right to withdraw his com-

plaint, and the action of the hearing examiners in withholding consent to such withdrawal, were briefed and argued at length in both the Denver District Court and the Supreme Court of Colorado. It was and is Continental's position that the regulation which attempted to limit the withdrawal of Green's private complaint, as distinguished from a complaint filed by the Commission, is in derogation of the statutory purpose to resolve by conciliation or settlement private disputes pertaining to racial or religious matters, and is therefore beyond the power of the Commission to adopt and hence invalid. It is Continental's further position that the action of those unidentified hearing examiners who refused to consent to the withdrawal was equally inconsistent with the purpose of the Act and improper.

It was in this posture that the action came on for review on the merits by the Denver District Court. Because that court concluded that Continental's jurisdictional claims were determinative, it did not reach the several other bases on which relief was sought. The trial court, in an extensive opinion, first examined the statute and found that "the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" (Comm. Pet. App. D, 59). It then recognized that one of the salient elements of interstate transportation was its routine and frequent multi-state contacts (Comm. Pet. App. D, 71). Thereafter, it further found that the Act could not be constitutionally extended to cover flight crew personnel of interstate air carriers (Comm. Pet. App. D, 91). Based on these findings it set aside the findings of the Commission and dismissed the complaint (Comm. Pet. App. D, 91). The Supreme Court of Colorado, on writ of error, reviewed this decision of the District Court and,

while noting that "... the district court held the ... Act, insofar as it purported to regulate the employment of flight crew personnel of an interstate air carrier, was invalid as creating a burden upon interstate commerce" (Comm. Pet. App. A, 22), it further found that "The only question resolved [by the trial court] was that of jurisdiction." (Comm. Pet. App. A, 27). The Supreme Court of Colorado held that "The trial court determined that the Act was inapplicable to employees of those engaged in interstate commerce. . ." and that the judgment of the trial court "was based exclusively upon that ground." (Comm. Pet. App. A, 27). Having thus interpreted the decision of the court below, it affirmed that decision, not only as to the result but also as to the District Court's findings and conclusions (Comm. Pet. App. A, 27).

Thus the issue is not whether Colorado has the general power to pass an anti-discrimination law. Such contention has not been made by Continental. The only orders in this case relate specifically to flight crew personnel of interstate air carriers, and the issue which has been ruled upon is whether the Colorado Act is applicable to such persons.

The Colorado Supreme Court noted that other issues remain in the case when it stated:

"If the question [whether the Colorado statute may be applied to flight crew personnel of an interstate air carrier] is answered in the negative other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution are academic and of no materiality to the issue to be determined." (Comm. Pet. App. A, 27).

Continental's position with respect to these matters has been indicated above. Such other issues involve important substantive and procedural questions which have not been ruled upon at any time by any court.

ARGUMENT

I. This Court Lacks Jurisdiction on Certiorari Because the Colorado Supreme Court Relied, inter alia, Upon an Independent and Adequate Non-Federal Ground as a Basis for its Decision.

It would appear that Petitioners interpret the opinion of the Colorado Supreme Court as being based solely on the Commerce Clause issues of pre-emption and burden on commerce. Continental contends that this is not so. Continental submits that the decision of the Colorado Supreme Court is that the Commission did not have jurisdiction in the matter for three reasons: first, the Colorado statute did not give the Commission jurisdiction over Continental as to its flight crew personnel; second, Congress has pre-empted this field; and third, if applied to Continental in this case the Colorado Act is an unconstitutional burden on commerce. Continental is of course aware that the Colorado Supreme Court modified its first opinion and will discuss that subject in more detail below. Notwithstanding that modification Respondent submits that the independent non-federal ground remains as a basis for the decision of the Colorado Supreme Court and the petitions for certiorari should therefore be denied.

The trial court included a non-federal ground as a basis for its decision. That court held "that the Colorado legislature was not attempting to legislate con-

cerning problems involving interstate commerce" when it enacted the 1957 Colorado Act (Comm. Pet. App. D, 59). It arrived at this conclusion after reviewing the 1957 Act and other pertinent Colorado statutes (Comm. Pet. App. D, 57-59). The trial court also held that the Act, to the extent applied to Continental's flight crew personnel, was invalid as creating a burden upon commerce and that Congress had preempted that area (Comm. Pet. App. D, 91). The Colorado Supreme Court clearly affirmed the trial court's decision on the pre-emption and burden grounds (Comm. Pet. App. A, 22; 25). However, the Colorado Supreme Court interpreted the trial court's decision as resting on the state ground also, stating that "the only question involved was that of jurisdiction", that "the trial court determined the act was inapplicable to employees of those engaged in interstate commerce" and that the judgment of the trial court "was based exclusively on that ground." (Comm. Pet. App. A, 27). Indeed, in its original opinion the Colorado Supreme Court stated, as the basis for the non-federal ground, the identical rationale of the trial court in practically identical language as follows:

"This language [referring to Colorado Revised Statutes of 1953, 80-24-2(5)] negatives the idea that there was any attempt on the part of the legislature to legislate upon a matter involving interstate commerce."

The Colorado Supreme Court without explanation deleted this single sentence in its final opinion when the petitions for rehearing filed by Green and the Commission were denied. Otherwise the original opinion remains unchanged. In the opinion as it now stands the Colorado Supreme Court sets forth at length with apparent approval earlier

state laws recognizing federal jurisdiction and authority in the realm of aeronautics (Comm. Pet. App. A, 22-24). Furthermore the Colorado Supreme Court not only affirms the trial court's findings and conclusions without reservation, it goes on to say:

"The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result." (Comm. Pet. App. A, 27).

Such approval of the trial court's decision and apparent reliance on other state statutes acknowledging federal authority leads to the conclusion that this independent non-federal ground remains as one of the three separate reasons for the decision of the Colorado Supreme Court that the Commission did not have jurisdiction in this case.

Thus, the opinion of the court below, even as amended, still finds that the trial court determined the Act was inapplicable to employees of those engaged in interstate commerce, and continues to affirm the decision of the trial court and to approve of the basis of that decision (Comm. Pet. App. A, 27). These factors, Respondent submits, are sufficient to show a non-federal ground for the decision below, fatal to jurisdiction in this Court.

Petitioner Green, and the Commission in its petition, however, allege jurisdiction in this Court under 28 U.S.C. A. § 1257(3) stating, in effect, that the decision below rests solely upon a holding that the 1957 Colorado Act is invalid as in conflict with the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States,

and because of conflict with federal statutes which preempt the field (Green Pet. 3; Comm. Pet. 2). However, if Continental's analysis of the proceedings and opinion below is correct, this is not the case, and it is well settled that this Court lacks jurisdiction on certiorari if the decision below rests upon an adequate independent and tenable² non-federal ground. See, e.g., *Wolfe v. North Carolina*, 364 U.S. 177 (1960) (Note 3 to the majority opinion); *Murdock v. Memphis*, 20 Wall. 590 (U.S. 1875); *Fox Film Corp. v. Muller*, 296 U.S. 207 (1935); *Herb v. Pitcairn*, 324 U.S. 117 (1945); see also *Quong Ham Wah Co. v. Industrial Commission*, 255 U.S. 445 (1921) at 448-49, where this Court held the state court's interpretation of a state statute, which avoided the federal question, was an adequate non-federal ground sufficient to deprive this Court of jurisdiction, even though the state court reached its interpretation of the statute only because it believed that to read the act otherwise would render it unconstitutional.

It is difficult if not impossible to explain the form and substance of the Colorado Supreme Court's opinion without reaching the conclusion that the non-federal ground is one basis for the decision that the Commission did not have jurisdiction. Respondent submits that a careful reading of that opinion confirms this conclusion.

If, as construed by the courts below, the Colorado Act does not confer jurisdiction upon the Commission over

²It should be noted that the Colorado Anti-Discrimination Act of 1957 is a general statute. It does not, in specific terms, purport to apply to flight crew personnel of Respondent, and therefore an interpretation of the Act by the state court to the effect that it does not apply to such personnel (employees of those engaged in interstate commerce) is clearly permissible.

Continental as to flight crew personnel, this Court lacks jurisdiction on certiorari because the construction to be placed upon a state statute is one of state, not federal law. Cf., *Railway Commission of Texas v. Pullman Co.*, 312 U. S. 496 (1941). Any determination of the Commerce Clause issues by this Court would "thus leave unaffected" the state court's judgment. Cf., *Flournoy v. Weiner*, 321 U.S. 253 (1944). In such a situation review of the decision below by this Court on certiorari should be denied. *Fox Film Corp. v. Muller*, *supra*.

II. Even Assuming, Arguendo, That the Jurisdictional Requisites for Review of This Case on Certiorari Are Technically Present, This Court Should Deny the Writ Because the Questions Which Bring the Case to This Court Are Not Ripe for Decision.

This Court has held, notwithstanding that the jurisdictional requisites for review by this Court are technically met, that its jurisdiction should be exercised only when the constitutional issues sought to be reviewed are presented in unambiguous and concrete form, unfettered by serious problems pertaining to the interpretation or application of the legislation in question by the state court. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).³

In cases where this requisite is not met, this Court has said:

"... the writs must be dismissed because constitutional questions which brought these cases here are not ripe for decision . . ." *Parker v. Los Angeles County*, 338 U.S. 327, 333 (1949).

³Cf. *Naim v. Naim*, 350 U.S. 891 (1955); *International Brotherhood v. Denver Milk Producers*, 334 U.S. 809 (1948).

Respondent submits the present case is of a similar nature. One basis of the decision by the Supreme Court of Colorado is, as Respondent contends above, an independent non-federal ground. There are other reasons why this case does not present constitutional questions in a form appropriate for determination by this Court. If the decision of the Supreme Court of Colorado be interpreted as deciding the case solely on federal constitutional grounds, rather than on an independent non-federal ground as above set forth, the well established doctrine that a court should not reach constitutional questions if the case may be decided on other grounds was ignored. *State of Colorado v. American Can Co.*, 117 Colo. 312, 186 P.2d 779 (1947); *Gale v. Statler*, 47 Colo. 72, 105 Pac. 858 (1909). Such lack of judicial restraint should not lightly be imputed to the Supreme Court of Colorado.

As the opinion below notes:

"... other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by the provisions of the Colorado constitution..." (Comm. Pet. App. A, 27).

were submitted but have not been determined. If the Supreme Court of Colorado had not based its decision, at least in part, upon an adequate state ground, it would have considered and determined one or more of the other unresolved issues tendered by Respondent in both courts below, including the following:

1. The Commission erred in the reception of evidence and by not granting Continental's motion to dismiss; the Commission's findings are not supported by substantial evidence.

2. As a matter of law these proceedings were, or should have been, terminated when Green withdrew his complaint prior to the initial decision of the Commission.

3. The actions of the Commission violated the Act, ignored the Commission's own rules and regulations, and contravened rights guaranteed to Continental by both the Colorado and United States constitutions; such irregularities, both during and after the Commission hearing, rendered the Commission's findings of fact and orders void.

Thus it affirmatively appears from the record and opinion below that the constitutional issues sought to be reviewed here are clouded by serious problems relating to the interpretation and application of the state statute by the Supreme Court of Colorado. Under such circumstances certiorari should be denied.

III. The Writ of Certiorari Should Not Be Issued Because the Decision of the Court Below Is Clearly Correct.

Assuming *arguendo* that the decision of the Supreme Court of Colorado was based solely upon a holding that the United States Constitution forbids application of the Colorado Anti-Discrimination Act to the facts of this proceeding, that decision was clearly correct and consequently no writ of certiorari should issue. If the decision was solely upon constitutional grounds, it rests upon a finding of two separate and independent conflicts with the United States Constitution. If the Colorado Supreme Court was correct in finding that *either* of Respondent's constitutional positions was meritorious, no writ should issue.

Respondent asserts that *both* positions were correctly accepted by the Colorado courts.

Continental has consistently maintained that the Colorado Anti-Discrimination Act may not constitutionally be applied to the flight crew personnel of an interstate air carrier for the following two reasons, either of which alone precludes such application: (a) burden on commerce; (b) pre-emption of the subject matter by Acts of Congress. Continental asserted these two defenses in its first pleading in this case. The defenses were thereafter maintained by Continental at all stages of this litigation.⁴ The Commission did not expressly reject either of these two defenses but did "assume" the constitutionality of the statute (509). The trial court in a comprehensive opinion held that both defenses were meritorious (Comm. Pet. App. D, 56-91) and the Supreme Court of Colorado affirmed the trial court's decision on both of these issues (Comm. Pet. App. A, 17-48).

Continental will first consider the proposition that an application of the Colorado Anti-Discrimination Act to the facts of this case would constitute an unconstitutional burden on commerce. The Colorado courts held that it would be such a burden. This holding is not contrary to the holdings of this Court; instead, it is in accord with decisions of this Court going back over 80 years. *Morgan v. Virginia*, 328 U.S. 373 (1946); *Hall v. LeCuir*, 95 U.S. 485 (1878).

⁴Continental asserted its two constitutional defenses in the proceedings before the Commission (174-75), in its petition to review the Commission's order (7-8), in the proceedings before the trial court, and in the appeal proceedings before the Colorado Supreme Court. Comm. Pet. App. A, 26-27.

In *Hall* this Court held that a state statute which *prohibited* discrimination by an interstate steamship carrier imposed a burden on commerce and hence was unconstitutional. The Court unanimously held that uniformity was required in this area and therefore Congress had the exclusive power to regulate. Inaction by Congress was equivalent to a declaration that this aspect of commerce should remain free of and untrammelled by state regulation.⁵ In *Morgan* this Court applied the burden on commerce rule to strike down a state statute which *required* segregation of passengers on motor carriers. Hence, this Court's application of the prohibition against burdens on commerce in this area has been consistent and neutral, and the rule is clear — the question of racial discrimination in the interstate operations of common carriers requires uniform national treatment and attempts by a state to regulate cannot stand.

Both petitions appear to recognize that the opinions of this Court in *Hall* and *Morgan* present formidable obstacles to their position. However, they do not suggest such a bold step as the overruling of these cases, and other cases decided in reliance upon the rules there enunciated. They seek in various ways to distinguish or discredit these cases, particularly *Hall*.⁶

⁵For the purpose of this portion of the argument only, Respondent assumes that Acts of Congress have not pre-empted the field. In the absence of such statutory pre-emption, the Commerce Clause itself occupies the field and precludes state action as to those subjects which "require a general system or uniformity of regulation." **Minnesota Rate Cases**, 230 U.S. 352 (1913). See also **Southern Pacific Co. v. Arizona**, 325 U.S. 761 (1945).

⁶Both petitions are more zealous in attacking *Hall* (which struck down a state statute **prohibiting** discrimination) than *Morgan* (which declared unconstitutional a state statute **imposing** segregation), even though the same constitutional principle was applied in both cases. The Colorado Supreme Court noted that counsel¹⁰ for the Department

The Commission asserts that *Hall* was "handed down seventy-six years prior to *Brown v. Board of Education*, 347 U.S. 483", that the case "has been evaded [sic] and devitalized" and that "it has no vitality today." (Comm. Pet. 12). The Colorado Supreme Court's opinion notes and rejects the same unsupported assertions (Comm. Pet. App. A, 30-31). Neither before the Colorado Supreme Court, nor in either petition, is any case by this Court (or, for that matter, by any court) cited in support of those assertions. In fact, the converse is true. Since *Hall* was decided, it has been cited in not less than 35 cases by this Court, and numerous times by other courts. *Shepard's United States Citations*.

Continental has found no case questioning the soundness of *Hall*, and Petitioners cite none. On the contrary, it is difficult to find a more express approval of a case than that given *Hall* in the majority opinion of this Court in *Morgan*:

"The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in *Hall v. DeCuir*, 95 U.S. 485." 328 U.S. at 383.

Mr. Justice Frankfurter, concurring, expressed his ap-

“(Continued)”

of Justice, appearing there as amicus curiae, had taken a similar position by first citing *Hall* with approval in a brief to this Court when the principle of that case was useful to the anti-discrimination stand there taken, and then rejecting *Hall* in the present proceeding when its doctrine was troublesome. The Colorado Supreme Court compared this to "attempts like the Roman god Janus to face both ways" (Comm. Pet. App. A, 30-31). Phrased differently, it represents an attempt to depart from this Court's application, in *Hall* and *Morgan*, of a constitutional principle in a neutral and consistent manner. See, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

proval of *Hall* in similar language.⁷ *Hall* was cited by this Court with apparent approval as late as 1960. *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444 (1960).

Other attempts to discredit or distinguish the doctrine of *Hall* and *Morgan* are of even more doubtful relevance. Both petitions rely upon *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945). (Comm. Pet. 15-16; Green Pet. 9-11). However, *Corsi* did not in any way involve the Commerce Clause of the United States Constitution.⁸ Similarly, Respondent's reading of *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); relied upon by Green, discloses no disapproval of that doctrine, but rather an express reaffirmance of the soundness of *Hall* and *Morgan*.⁹

Both Petitioners place some reliance on the Colorado Enabling Act and the 14th Amendment to the United States Constitution. The Enabling Act merely provides that the Colorado constitution shall "make no distinction in civil or political rights on account of race or color" nor "be repugnant to the constitution of the United States." No one has contended that the Colorado constitution makes

⁷"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall v. DeCuir*, 95 U.S. 485, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court." 328 U.S. at 388.

⁸The trial court in this case correctly analyzed *Corsi*:

"*Corsi*, interpreted most favorably to [Petitioners], only held neither the due process clause of the 14th Amendment, nor the equal protection clause, nor the clause conferring authority over postal matters upon Congress prevented a state from adopting a civil rights statute. The application of such a statute to interstate commerce was neither raised nor discussed nor decided." (Comm. Pet. App. D, 71).

⁹See the trial court's analysis of the *Bob-Lo* case. Comm. Pet. App. D, 69-71.

any such distinction or is repugnant to the U. S. Constitution. Similarly, with respect to the 14th Amendment, there is no issue in this case of state action to deny 14th Amendment rights and no denial of the power of Congress to enforce, by appropriate legislation, those rights. Finally, this case does not present a challenge to Colorado's general right to enact an anti-discrimination law pursuant to its police power. Only its application to personnel involved in the interstate operations of common carriers is in issue, and Continental submits that the decision of the Colorado Supreme Court is in accord with the decisions of this Court.

Even if the application of this state statute did not conflict with the requirement of the Commerce Clause for uniform national rules in this area, the decision of the Colorado Supreme Court is clearly correct for another reason. Two comprehensive federal acts govern Continental's conduct with respect to the matters here in issue and preclude extension of the Colorado Act to the facts of this case.

The Colorado Supreme Court specifically and correctly held that the pre-emption doctrine precludes application of the Colorado statute to the facts of this case:

"Congress has pre-empted the field of law concerning racial discrimination in the interstate operations of carriers (generally and specifically with relation to employment of interstate operating personnel) and has thereby precluded exercise of authority by the several states in this field." (Comm. Pet. App. A, 25).

In addition, it is noteworthy that counsel for the Depart-

ment of Justice, appearing as amicus curiae in the proceedings before the Colorado Supreme Court, did not seriously question the applicability of the Civil Aeronautics Act to racial discrimination by interstate air carriers against applicants for employment.¹⁰

The Civil Aeronautics Act, 49 U.S.C.A. §§ 401 et seq. (now the Federal Aviation Program Act, 49 U.S.C.A. (Supp.) §§ 1301 et seq.) regulates and controls the racial policies of interstate air carriers. The plain and unambiguous language of the Aviation Act¹¹ specifically forbids any air carrier to subject any "person" to "any unjust discrimination." 49 U.S.C.A. § 484(b); 49 U.S.C.A. § 1374(b). In *Fitzgerald v. Pan American World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956), the court held that a carrier violated this statute by denying first-class passage because of race, and that the statute created an actionable civil right pursuant to which the person discriminated against could bring a federal action.¹² *Fitzgerald* is a clear holding that racial discrimination against "any person" in interstate air commerce is prohibited by federal law. The court also noted that "Congress sought uniformity in the practices of those subject to this Act." 229 F.2d

¹⁰"The Government takes no position on whether the provision relied upon by the court below, or any other provision of federal law governing air commerce, proscribed or proscribes discrimination between applicants for employment on the basis of race." (Govt. Amicus Curiae Brief in proceedings before Colo. Sup. Ct. at p. 41).

¹¹Since the applicable provisions of the Civil Aeronautics Act, in effect at the time of the alleged refusal to hire, and the Federal Aviation Program Act, now in effect, are identical Respondent refers to both Acts collectively as the "Aviation Act."

¹²For another holding that the preference and discrimination provisions of 49 U.S.C.A. § 484(b), as amended, create a cause of action enforceable in the federal courts at the suit of the injured party, see the recent district court decision in *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961).

at 502. Cf. *Northwest Airlines, Inc. v. Minnesota*, 322 U. S. 292, 303 (1944) (concurring opinion); *Mitchell v. United States*, 313 U.S. 80 (1941); *Allegheny Airlines, Inc. v. Cedarhurst*, 132 F. Supp. 871, 881 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956).

Any doubt as to the scope or correctness of *Fitzgerald* was removed by the recent decision of this Court in *Boyn-ton v. Virginia*, 364 U.S. 454 (1960), which held that Sec-tion 216(d) of the Interstate Commerce Act (49 U.S.C.A. § 316(d)), applicable to motor carriers, prohibited racial discrimination against an interstate bus passenger by a bus terminal restaurant which was "an integral part of the bus carrier's transportation service" but was not owned, operated or directly controlled by the bus com-pany. This Court noted that the Interstate Commerce Act "uses language of the broadest type to bar discriminations of all kinds." 364 U.S. at 457. Since the applicable fed-eral statutory provisions governing air carriers and motor carriers are identical in all material respects (compare 49 U.S.C.A. § 484(b) with 49 U.S.C.A. § 316(d)), it can-not be doubted that an air carrier is barred, by federal statute, from "discriminations of all kinds." Conse-quently, a pervasive and comprehensive federal statutory system, the Aviation Act, governs the racial policies of carriers subject to that Act, and normal pre-emption rules applicable to federal interstate commerce enactments, and the decisions of this Court, preclude the application of the Colorado statute to this field. *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404 (1925). Cf. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957); *United States v. New York Central R.R.*, 272 U.S. 457, 464 (1926).

The Colorado courts correctly decided that the Colorado statute would not extend to this area.

Finally, the Railway Labor Act (45 U.S.C.A. §§ 151 et seq.), as interpreted by the courts, prohibits racial discrimination by carriers subject to that Act. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 775 (1952).¹³ Although *Howard* dealt with discrimination against an employee rather than an applicant for employment, Continental submits that a fair reading of *Howard* and the other cases in this series, indicates that this Court has held that Congress intended to prohibit all types of racial discrimination by employers subject to the Railway Labor Act. Further, and of even more significance, the Colorado statute forbids discrimination against not only applicants for employment but also employees (1953 Colo. Rev. Stat. 80-24-6(2) (1960 Perm. Supp.)). It would be an anomalous result not warranted by authority to permit the Colorado statute to be applied to the employment of a pilot by an interstate air carrier when it could not be applied to discrimination in discharge, promotion or compensation of this same person.

¹³For a detailed discussion of the numerous decisions of this Court dealing with the Railway Labor Act's prohibition of racial discrimination by both unions and carriers subject to the Act, see the trial court's opinion. Comm. Pet. App. D, 76-81.

CONCLUSION

For the reasons stated above, it is therefore respectfully submitted that this Court should deny the Petitions for Writs of Certiorari.

Respectfully submitted,

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In the Supreme Court

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United States

OCTOBER TERM, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION
COMMISSION, et al.,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.,

Respondents.

**BRIEF OF THE ATTORNEYS GENERAL
OF THE STATES OF CALIFORNIA AND MISSOURI,
AMICI CURIAE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI TO THE
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OCTOBER TERM, 1962

No.

Petitioners,

vs.

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**BRIEF OF THE ATTORNEYS GENERAL
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SUPREME COURT OF THE STATE OF COLORADO**

I. INTEREST OF THE AMICI

The fundamental interest of the States of California and Missouri in seeing that a diminution of the authority of their anti-discrimination agencies does not occur is indicated by the forceful statement of policy contained in California Fair Employment Practice Act:

“It is hereby declared as the public policy of this State that it is necessary to protect and

safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, or ancestry.

"It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for such reasons, foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interests of employees, employers, and the public in general." (Calif. Lab. Code § 1411.)

The Missouri Fair Employment Practice Act (Chapter 296, Revised Statutes of Missouri, 1961 Cum. Supp.) states a similar policy of the State of Missouri although not in express terms. The Missouri Act provides that discrimination in employment by reason of race, creed, color, religion, national origin or ancestry is prohibited by employers coming within the purview of the Act, and an enforcement procedure is established. Thus, inherent in the Act is expressed the above policy stated in the California Act.

Substantial numbers of persons are employed by interstate carriers in the States of California and Missouri. Thus to excise interstate carriers from the jurisdiction of the FEPC is to substantially restrict the ability of these states to effectuate their anti-discrimination policies, which as indicated by the statements quoted above, is motivated by matters of deep concern to the states.

II. ARGUMENT (REASONS FOR GRANTING THE WRIT)

A. THE QUESTION PRESENTED IS ONE OF SUBSTANTIAL IMPORTANCE NOT HERETOFORE DETERMINED BY THIS COURT

The eradication of employment discrimination presents one of the most compelling social problems of our time. Since the federal government has left the matter largely unattended, attempts at solution have been undertaken by a growing number of states. However, the holding of the court below in the instant case brings into question the degree of potency of state action in this field. Doubts in this respect may inhibit the states from acting in borderline areas. Because of the urgency of the problem of employment discrimination, a state should not be unnecessarily deterred from bringing the whole range of its jurisdiction within the system it has devised to combat the problem. Any doubts as to the limits of state jurisdiction in the anti-discrimination field can be finally resolved only by a ruling of this court. Thus the petition for the writ of certiorari should be granted.

B. THE JUDGMENT BELOW WAS ERRONEOUS (PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT)

1. As Judged by the Balance of Interest Test

In recent years this court has been determining the existence of a burden on interstate commerce, upon the pragmatic basis of whether in a particular case a given state interest has more weight than the

national interest in unrestricted commerce. As was said in *California v. Zook*, 336 U.S. 725, 728:

"Absent congressional action, the familiar test is that of uniformity versus locality: If a case falls within an area in commerce thought to demand a uniform national rule, state action is struck down. If the activity is one of predominantly local interest, state action is sustained. More accurately, the question is whether the state interest is outweighed by a national interest in the unhampered operation of interstate commerce."

Therefore, if the state interest was predominant, a state statute was upheld even though it did have some effect on the free flow of commerce. (*California v. Zook*, *supra*, at 735.) For example, in the case of *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U.S. 177, this court held that a state statute specifying the maximum weight and width of vehicles traveling its highways was valid although it affected interstate vehicles. The court reasoned that the state had an interest in protecting its highways that outweighed any national interest in the free flow of commerce. In the case of *Clark v. Poor*, 274 U.S. 554, this court held that an Ohio statute requiring a certificate and extra tax from vehicles using the highways within the state was valid. Here the state interest in the upkeep and maintenance of their highways was deemed greater than the national interest in keeping commerce free of such state regulation.

The case presently before the court concerns the Colorado Anti-Discrimination Act commonly known in most other states as Fair Employment Practice Acts. The United States Government has no National Fair Employment Practice law. Therefore, this cannot be a case of conflicting statutes in the field of Fair Employment legislation. Only the state law is involved, and the question that has been posed is whether or not the Colorado law as it affects interstate commerce is an undue burden on that commerce and therefore invalid at least in this respect. Of course, our federal government is concerned about nondiscrimination in employment, but it has not as yet responded to this interest by passing a Fair Employment Practice Act. But today some twenty-two states in our Union have become concerned about the problem to the extent of passing laws outlawing discrimination in employment. The state interests in prohibiting such conduct are numerous. Discrimination in employment increases unemployment within the state; it affects the total earning and buying power of its population. It depresses the potential wealth of the state by depriving the state of the fullest utilization of its capacities for development and advancement, thus substantially and adversely affecting the interests of employees, employers, and the public in general.

It is therefore clear that the state interests to be protected in this case are of prime magnitude. On the other hand, the obstruction to the free flow of commerce effected by the state's anti-discrimination

law, if at all existent, would at most be minor and incidental. Thus it cannot properly be said that "the state interest in this case is outweighed by a national interest in the unhampered operation of interstate commerce." This proposition is amplified by the fact that State Fair Employment laws are an affirmative implementation of a constitutional policy of the utmost weight, the providing of equal protection. Therefore we submit that the outweighing of State interests should be clearly apparent before its measures in pursuance of this grave constitutional policy be deemed an undue burden on interstate commerce.

2. As Judged by the Uniformity Test

But the Colorado Supreme Court chose to base its conclusion on the more traditional test of whether there is a need for national uniformity. (368 P. 2d at 973, 974-5). Granting that the requirements of national uniformity of regulation are still a significant criterion in the determination of what constitutes an unconstitutional burden on interstate commerce, we respectfully submit that the requirement of nondiscriminatory hiring policies is *not* that type of regulation which is "of such a nature as to require exclusive legislation by Congress." (*Cooley v. Board of Wardens*, 12 How. 299, 319.)

The uniformity criterion was not arbitrarily fabricated as a mere convenience for decision making, nor conjured without reference to the factual realities of commercial obstructions. On the contrary, the cases proclaiming this principle constitute a catalog of

concrete examples wherein a multiplicity of regulatory sources would indeed frustrate the free flow of interstate commerce. Thus, in overturning a state law on this ground, there must be an existence of those factors leading to the obstruction of commerce.

For example, in overruling a state statute outlawing passenger segregation on common carriers, this court in *Hall v. De Cuir*, 95 U.S. 485, describes the very real disruption to interstate commerce that would be engendered by lack of uniformity in this area of law:

"On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed, from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be." (95 U.S. 485 at 489.)

In the more recent *Morgan v. Virginia*, 328 U.S. 373 (1946), this court applied the principles enunciated in *Hall* to a Virginia statute requiring segregation. Again, the need for a single source of authority

in the area of racial segregation of passengers on interstate carriers was demonstrated by detailed exposition of the inconveniences and obstructions to the free flow of commerce that would result if diverse regulations were countenanced (328 U.S. at pp. 381-386).

From these cases the Colorado Supreme Court purports to discern this as the rule established by the United States Supreme Court: Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States. However, the Colorado Court omits a vital step in arriving at this conclusion. It failed to require a demonstration of *why* the subject of the particular law in question demands regulation by a single source. Mere reference to *Hall* and *Morgan* does not obviate this requirement. These cases merely proclaim the general principle within which each concrete case must be decided. Thus, in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960), a case which approved of the uniformity principle announced by *Hall*, this court refused to overturn a local regulation attacked as an impermissible burden on interstate commerce, because of a failure to show any "competing or conflicting local regulation" (362 U.S. at 448).

In *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, another case accepting the premises of *Morgan* and *Hall*, this court again upheld local regulation. Here it was pointed out that local regulation is not precluded

where the factual situation negated the need for a single source of regulation. Such factors as "the attenuating effects" upon interstate commerce likely to result from enforcement of the state regulation and "any actual probability of conflicting regulations by different sovereignties" were deemed relevant in reaching this conclusion. (68 S. Ct. at 363.)

In the instant case, we submit, there has been a complete absence of those factors demanding regulation by a single source. *Hall* and *Morgan* did not proclaim that racial regulations per se were an unreasonable burden when applied by the states. It was the potentiality of diverse laws among the states that necessitate reserving this subject to a single regulating source, but today this potentiality has been precluded by the rulings of this court which render state law requiring discrimination by common carriers repugnant to the equal protection clause. (*Brown v. Board of Education*, 347 U.S. 483; *Browder v. Gayle*, 352 U.S. 903; *Bailey v. Patterson*, 369 U.S. 31.) Thus, an interstate carrier which is compelled to obey the anti-discrimination laws of one state will not be confronted with harassment of conforming to segregation laws as it crosses into other states although this was the very real "embarrassment" that would have been inflicted upon the carrier had the local law been upheld at the time *Hall* and *Morgan* were decided.

Therefore, while *Hall* and *Morgan* are still vital as authority for the proposition that state regulation in an area demanding regulation from a single

source constitutes an undue burden on interstate commerce, we respectfully submit that they can no longer stand for the proposition that antidiscrimination regulations applicable to interstate carriers are beyond the province of state imposition. On the contrary, such local regulation now constitutionally insulated from conflicting laws is manifestly in aid of the clearly enunciated Federal policy of equal protection.

III. CONCLUSION

Because the question of jurisdiction of state anti-discrimination agencies is one of substantial importance and because the court below in limiting such jurisdiction did not properly apply the rulings of this court, it is respectfully urged that this court grant the petition for writ of certiorari so that the jurisdictional limitations in question may be authoritatively defined.

Dated, September 27, 1962.

Respectfully submitted,

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Amici Curiae.

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October Term, 1962

No. [REDACTED] **492**

THE COLORADO ANTI-DISCRIMINATION COMMISSION,
AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE
C. BELLINGER, GENE MANZANARES, ROBERT C.
KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as
members of said Commission, and MARLON D. GREEN,

Petitioners,

vs.

CONTINENTAL AIRLINES, INC.,

Respondent.

**Brief for the Catholic Council on Civil Liberties as
Amicus Curiae.**

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IN THE
Supreme Court of the United States

October Term, 1962

No. 1325 Misc.

THE COLORADO ANTI-DISCRIMINATION COMMISSION
AND EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE
C. BELLINGER, GENE MANZANARES, ROBERT C.
KEELER, GEORGE J. WHITE, and GEORGE O. CORY, as
members of said Commission, and MARLON D. GREEN,

vs.

Petitioners,

CONTINENTAL AIRLINES, INC.,

Respondent.

**Brief for the Catholic Council on Civil Liberties as
Amicus Curiae.**

Consent to File.

This brief is filed pursuant to Supreme Court Rule 42(2). Consent of all parties of record has been filed separately with the Court.

Interest of Amicus Curiae.

At their annual meeting in Washington, D. C., in 1958, the Catholic bishops of the United States issued a statement on "Discrimination and the Christian Conscience." In this declaration the bishops called upon "responsible and soberminded Americans of all religious faiths" to "seize the mantle of leadership from the agitator and the racist." The bishops identified the heart of the race question as "moral and religious" and em-

phasized that "it is vital that we act now and act decisively." In their statement the bishops singled out denial of job opportunity, along with substandard education and housing, as "oppressive conditions" which have been imposed upon the American Negro by segregation. Two reasons were listed to show that the Christian view of man and enforced segregation cannot be reconciled:

(1) "Legal segregation, or any form of compulsory segregation, in itself and by its very nature imposes a stigma of inferiority upon the segregated people."

(2) "It is a matter of historical fact that segregation in our country has led to oppressive conditions and the denial of basic human rights for the Negro."

Although the Irish, Jewish, Italian, Polish, Hungarian, German, and Russian immigrants have achieved their rightful place in American society, the bishops pointed out, Negroes still seek the same opportunity:

"They wish their civil rights as American citizens. No one who truly loves God's children will deny them this opportunity."

It is in this spirit that the Catholic Council on Civil Liberties writes this brief, joining its efforts with Americans of other faiths hopefully to achieve a greater measure of job opportunity for the American Negro in the industries where most of the jobs are, the industries which are covered by the commerce clause of the Federal Constitution.

The Catholic Council on Civil Liberties is an affiliate of the National Catholic Social Action Conference of

the National Catholic Welfare Conference. CCCL is the successor of the American Freedom Council, which was organized in 1958 by a group of Catholic laymen in Omaha, Nebraska. The national director of the organization is a layman, Thomas Francis Ritt, of Lawndale, California, and chairman of the national advisory committee is Edward J. McCormack, Attorney General of Massachusetts. The national advisory committee and the board of directors include many prominent leaders of Catholic thought, among them Dean Joseph O'Meara, Jr., School of Law, Notre Dame University; Rev. John F. Cronin, S. S., Assistant Director, Social Action Department, NCWC; Edward A. Marciniak, Treasurer, National Social Action Conference, NCWC; John Cogley, Center for the Study of Democratic Institutions; Rev. George H. Dunne, S. J., Georgetown University; Dean John C. Hayes and Rev. William J. Kenealy, S. J., Loyola University School of Law, Chicago; Dean Vincent C. Immell, School of Law, St. Louis University; Rev. L. J. Twomey, S. J., Director, Institute of Industrial Relations, Loyola University, New Orleans; Rev. Louis A. Gales, President, Catholic Digest; Richard Deverall, UAW, AFL-CIO, Washington, D. C.; Professor Edgar A. Jones, Jr., School of Law, University of California at Los Angeles; William B. Ball, counsel, Pennsylvania Catholic Welfare Committee; Rev. Benjamin L. Masse, S. J., Associate Editor, America and Professor Victor Ferkiss, Georgetown University.

Marlon D. Green is a Catholic. Perhaps this is the reason he invited the Catholic Council on Civil Liberties to file as *amicus curiae* in his case. But the CCCL has not entered the case merely to defend a parochial interest. The CCCL belongs in a case like this because

the question of racial equality "concerns the rights of man and our attitude toward our fellow man," to quote the bishops' 1958 statement once again, and because the dignity of all men is degraded when a Negro is denied employment because of his race.

Statement of the Case.¹

Marlon D. Green, a pilot officer in the U. S. Air Force with the rank of Captain, returned from an Air Force tour of duty in Japan in April, 1957, and applied for employment as a pilot with respondent, Continental Air Lines, Inc., herein called Continental [pp. 224-225]. The application was placed on file, and in June, 1957, Continental began recruiting to fill some fourteen or fifteen pilot positions. Continental at that time sent Green an invitation to come to its administrative offices in Denver for an employment interview, not knowing he was a Negro [pp. 226, 227, 433]. In Denver Green took and passed a link trainer and flight test administered by respondent [pp. 231, 232, 235-239]. Five other applications were considered along with Green at about the same time, and the flying experience of the six applicants is shown by the following table:

	<u>Total Hours</u>	<u>First Pilot</u>	<u>Co- Pilot</u>	<u>Multi- Engine</u>	
Green	3071:30	1838:15	778:45	2900:00	[pp. 490, 310]
George	2100:53	1145:35	874:13	897:23	[pp. 474, 494]
Stearns	1200:00	750:00	450:00	934:00	[pp. 478, 493]
Bryant	1150:00	1160:00	—	5:00*	[pp. 486, 495]
Dresser	1031:00	916:00	—	—	[pp. 482, 496]
Cole	1000:00	900:00	100:00	200:00	[pp. 470, 497]

¹References will be made to page numbers of the consolidated record.

*Acquired between June 25, 1957, when Green and Bryant were examined, and July 1, 1957.

Respondent's Vice President in charge of personnel admitted that Continental considered Green to be a qualified pilot [p. 343]. Four of the five who applied with Green were asked to enter Continental's training program in June, 1957, and the fifth was asked in September, 1957. Meanwhile, Continental hired ten additional pilots in August [pp. 325, 353, and 365]. Green was never asked and was never hired.

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission [p. 165], and in its answer respondent set up the defenses of conflict with the commerce clause of the federal Constitution, Article I, Sec. 8, and federal pre-emption [pp. 172-175]. Hearing before the Commission was held on May 7, 1958 [p. 180], and on December 19, 1958 the Commission entered its Findings of Fact, Conclusions of Law, and Orders in the case (App. C, Pet. for Cert. filed by the Commission), requiring respondent to give Green the first opportunity to enroll in its next training course with a priority status of June 24, 1957. The Commission found that Green was denied employment because of his race, although he was "better qualified for the position of co-pilot than any applicant interviewed."

Continental appealed the Commission's decision to the District Court of Denver, Colorado, which remanded the case to the Commission to make findings of fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the anti-discrimina-

tion statute, and whether the employment for which Green had applied actually involved interstate commerce [pp. 44, 45]. The Commission thereupon made a new decision and purported to vacate its original one [pp. 526-544], and the District Court thereafter held that the Commission's new action had rendered the complaint moot [p. 65]. Upon review in the Colorado Supreme Court by writ of error, *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.* (1960), 355 P. 2d 83, the Supreme Court held the Commission was powerless to withdraw its initial decision and that its second decision was void. The District Court was ordered to rule on the first decision of the Commission.

In the District Court proceedings which followed, the parties entered a stipulation to the effect that Continental was engaged in interstate commerce, that the Commission would find Continental was subject to the Anti-Discrimination Act, and that the position Green had applied for involved interstate operations [pp. 550-551]. In extensive Findings of Fact, Conclusions of Law, and Judgment, the District Court held that as applied to Continental the Anti-Discrimination Act was an unreasonable burden upon interstate commerce and hence invalid under the commerce clause, and it held further that jurisdiction over the subject matter had been preempted by the Railway Labor Act, the Civil Aeronautics Act of 1938, and federal executive orders.

Writ of error was then brought in the Colorado Supreme Court, which affirmed the trial court judgment

on the ground that the Colorado statute offended the commerce clause. The Court observed that "The findings, conclusions, and judgment of the trial court might well be adopted in toto as the opinion of this court." *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 368 P. 2d 970. Both Green and the Commission applied for, certiorari, which was granted.

The Issue.

The issue in this case is whether Colorado is barred from applying its Anti-Discrimination statute to applicants for employment with interstate carriers by air, either by reason of the Commerce clause of the Federal Constitution, Article I, Section 8, Clause 3, or on the ground that the Railway Labor Act, the Civil Aeronautics Act of 1938, the Federal Aviation Program Act, and federal executive orders have pre-empted the field of race discrimination in hiring to the exclusion of the states.

Summary of Argument.

I.

The Colorado Anti-Discrimination Act does not burden or impede the free flow of interstate commerce. On the contrary, it removes a costly and wasteful obstruction to interstate commerce.

A. National uniformity is not necessary in the hiring of employees as it is in the transportation of passengers.

B. A balancing of state and national interests clearly shows that the state regulation is reasonable.

C. Continental rejected the best qualified applicant on account of race. This is the real burden upon commerce in this case, and state police power is competent to remove it.

II.

Neither the Railway Labor Act, the Civil Aeronautics Act, the Federal Aviation Program Act, nor federal executive orders indicate an intention to occupy the field of hiring applicants for employment to the exclusion of the states.

A. Pre-emption principles stated in *Corsi* and *Garmon* sustain State regulation here.

B. The Railway Labor Act does not govern racial policies of carriers relating to hiring.

C. The Civil Aeronautics Act does not exclude state jurisdiction.

D. Colorado's program does not interfere with enforcement of federal executive orders.

ARGUMENT.

I.

The Colorado Anti-Discrimination Act Does Not Burden or Impede the Free Flow of Interstate Commerce. On the Contrary, It Removes a Costly and Wasteful Obstruction to Interstate Commerce.

A. National Uniformity Is Not Necessary in Hiring Employees as It Is in the Transportation of Passengers.

The Court below relies heavily upon *Morgan and Hall v. DeCuir*, 95 U. S. 485 (1878). But those cases, on their facts, picture a checkerboard pattern of interstate passenger carriage resulting from diverse State regulations, with buses and carriers by water being stopped at State boundaries to rearrange passengers to suit the conflicting policies of the various jurisdictions. Accordingly, a need for national uniformity was found to exist in passenger regulations, and the Court observed in *Hall* that:

“On one side of the river or its tributaries (the carrier) might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business . . . if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate.”

Morgan found the same need for national uniformity to avoid the interference with commerce occasioned by the requirements of the Virginia statute that passengers be repeatedly required to shift seats.²

²Cf. *Southern Pacific Company v. Arizona*, 325 U. S. 761 (1945), *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959).

But no such specter is conjured up by the case at bar. The Fourteenth Amendment precludes possibility of a checkerboard of conflicting state policies in the field of hiring, for no state could promote a policy of discrimination in employment without denying equal protection. *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Brozen v. Board of Education*, 347 U. S. 483 (1954). If State A has a no-discrimination policy which it applies to airline pilots, and State B has no policy one way or another, this threatens no interruption of commerce in State B or anywhere else. This important difference between carrying passengers on the one hand, and hiring employees on the other, would seem to make the passenger cases inapplicable to the problem now before the Court.

B. A Balancing of State and National Interests Clearly Shows That the State Regulation Is Reasonable.

Where a State regulation is challenged on the ground that it violates the commerce clause of the Federal Constitution, Article I, Section 8, the question whether the regulation unreasonably burdens interstate commerce is determined by looking to the facts of each case and then balancing the interest which the State seeks to further against the interest of the nation which is alleged to be adversely affected.

On the side of the scale which represents the interest sought to be protected by the State, we have in the case

where novel State regulations were similarly struck down because they directly interfered with interstate movement of trains and trucks. In *Arizona* the State regulation prevented the free flow of commerce "by delaying it and by substantially increasing its cost and impairing its efficiency." In the case at bar, however, the State regulation involves no delay to planes in transit, no increase in costs whatever, and no impairment of efficiency.

at bar a permissible object for the exercise of the police power, namely, equality of job opportunity regardless of race or creed. *Railway Mail Association v. Corsi*, 326 U. S. 88 (1945), *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948). The case is thus distinguished from *Morgan v. Virginia*, 328 U. S. 373 (1946), relied upon by the court below, because *Morgan* involved an unlawful object of a Virginia statute, namely, discrimination against Negroes in interstate travel.

Not only is Colorado's object a constitutionally permissible one, but the means the state has chosen bear a reasonable relation to the object sought to be achieved. In this important respect, the case at bar differs from a number of cases in which local regulation of interstate commerce has been invalidated on the ground, among others, that the means chosen in the State regulatory programs were not shown to serve their declared purposes effectively. Examples are *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945), where the Arizona long-train statute, passed as a safety measure, was found to make train operation more dangerous, and *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959), where contour mudguards required by an Illinois statute in the name of safety possessed no advantage over the conventional mudguard but probably created "hazards previously unknown on the highways." In the instant case, however, there is no showing that the means chosen by Colorado to accomplish the purpose of equality in employment will be ineffective.

Thus, in an effort to determine whether the State's regulation unreasonably burdens interstate commerce, we have found, on the side of the scale representing the State's interest, a proper object served by proper means.

On the side of the scale representing the Federal interest, what are we to balance against this?

If we seek to identify a national interest which is opposed to the State's interest here, we can find none. For at stake in Green's case is the question whether the American people will perform or sorely disappoint the promise—the American dream, if you will—of equal opportunity for equally qualified men in employment, regardless of race. Every United States post office displays literature in which young Americans of all races are urged to join one or another of the armed forces to learn a trade. Surely the national interest is not well or decently served by a policy which would cynically nullify the inducement the government has offered to these young men. We dare not say to the Marlon D. Greens of America that their country will train them to fly airplanes in its defense, but if they try to use the training so acquired to get jobs to support themselves and their families, their country's interest, as reflected in its supreme law, must bar their employment.

In this case the scales on which State and Federal interests are weighed are one-sided, for no national concern requires Colorado to abandon the vital interest it would protect by its anti-discrimination statute. The national interest is not frustrated but on the contrary is fostered by the regulation Colorado has adopted. Accordingly, the regulation must be found to be eminently reasonable.

C. Continental Rejected the Best Qualified Applicant on Account of Race. This Is the Real Burden Upon Commerce in This Case, and State Police Power Is Competent to Remove It.

Marlon D. Green was denied employment because of his race, although he was "better qualified for the position of co-pilot than any applicant interviewed. . . ." Such was the finding of the Colorado Anti-Discrimination Commission.³ Green, with 3,071 flying hours, was rejected because his skin was black, and Cole with 1,000 flying hours, only half of the minimum stated by Continental in its list of qualifications, was put to work flying the company's airplanes in interstate commerce. Continental's policy of rejecting Negroes, however well qualified, is thus patently shown to render its passenger service less efficient. Its discriminatory policy is clearly an obstruction to commerce, and all who fly on its planes are compelled to pay the price of Continental's discrimination. The price they pay is that they are sometimes not served by the best qualified and most experienced employees. What is Colorado seeking here but to remove this costly and wasteful obstruction to interstate commerce? Compare those constitutionally allowable State regulations cited in *Southern Pacific Co. v. Arizona*, 325 U. S. 761:

" . . . where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains. Such are measures

³See Green's petition for certiorari, pages 6 and 7.

abolishing the car stove . . . , requiring locomotives to be supplied with electric headlights . . . , providing for full train crews . . . , and for the equipment of freight trains with cabooses . . . (citing cases)."

Thus it is seen that *Green* is properly grouped with the cases where a State regulatory effort was found to be an aid to commerce and not an interference with it, and where on that account the commerce clause did not invalidate the State regulatory program.

II.

Neither the Railway Labor Act, the Civil Aeronautics Act, the Federal Aviation Program Act, nor Federal Executive Orders Indicate an Intention to Occupy the Field of Hiring Applicants for Employment to the Exclusion of the States.

A. Pre-emption Principles Stated in *Corsi* and *Garmon* Sustain State Regulation Here.

In the field of race relations, the governing principle for the solution of pre-emption problems is stated in *Railway Mail Ass'n v. Corsi*, 326 U. S. 88 (1945), where the Court indicated that "Congress must clearly manifest an intention" to exclude State regulation "before the police power of the state is powerless." On this test alone the claim of pre-emption must fall in the instant case, for in no statute has Congress "clearly manifest" an exclusory intention.

In the area of industrial relations, one of the principal tests applied by the Court to determine whether federal pre-emption exists has been stated in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959),

which summed up the results reached in a long line of labor relations cases as follows:

“When the exercise of state power over a particular area of activity *threatened interference with the clearly indicated (federal) policy of industrial relations*, it has been judicially necessary to preclude the States from acting.” (Emphasis supplied).

But one looks in vain in the case at bar for the merest suggestion of any “threatened interference with the clearly indicated (federal) policy of industrial relations” or with any other federal policy.

B. The Railway Labor Act Does Not Govern Racial Policies of Carriers Relating to Hiring.

The Railway Labor Act, 45 U. S. C. 151 *et seq.*, cannot be said to address itself to the racial hiring policies of the airlines. Cases arising under the Railway Labor Act and relied upon expressly by the trial court and inferentially by the Supreme Court of Colorado (*Colorado Anti-Discrimination Commission v. Continental Air Lines Inc.*, 368 P. 2d 970) do not support the view that that statute pre-empts the field of race discrimination in hiring applicants for employment. *Steele v. Louisville and Nashville R.R. Co.*, 323 U. S. 192 (1944); *Bortherhood of R.R. Trainmen v. Howard*, 343 U. S. 768 (1952), and *Conley v. Gibson*, 355 U. S. 41 (1957), stand for the principle that a labor organization certified to represent employees in a craft or class on a covered carrier has a duty of fair representation, *i.e.*, a duty to represent all employees in the bargaining unit fairly, without distinction as to race. This conclusion derives from the proposition that under the statute

the representative of the majority is the exclusive representative of all employees in the bargaining unit, and that such employees may not be represented by minority unions or even by themselves. These cases by no means transform the Railway Labor Act into a federal Fair Employment Practices Act for rail and air carriers; the decisions do not purport to direct what *employers* may or may not do in hiring *applicants* for employment on the basis of race.

Indeed, it may well be questioned whether the Railway Labor Act legislates with respect to applicants for employment at all:

Fifth. The term 'employee' as used herein includes *every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his services)* who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission (emphasis added).⁴

The purposes of the Railway Labor Act as recited in 45 U. S. C., Sec. 151(a), include no attempt to deal with the problem of racial discrimination by carriers in hiring applicants for employment, and no other provision of that enactment deals with that question. See *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Terminal Ass'n v. Trainmen*, 318 U. S. 1 (1943).

⁴Railway Labor Act, 45 U. S. C. Sec. 151(5). Compare the very broad language of the National Labor Relations Act, 29 U. S. C. Sec. 152(3).

C. The Civil Aeronautics Act Does Not Exclude State Jurisdiction.

Another prong of the pre-emption argument involves the contention, expressly adopted by the trial court and evidently approved by the Supreme Court of Colorado, that the Civil Aeronautics Act, 49 U. S. C. Sec. 484(b), (and the successor Federal Aviation Program Act, 49 U. S. C. Supp. Sec. 1301 *et seq.*) without doubt precludes discrimination in employment. On this point we find ourselves in full agreement with the view expressed on behalf of the United States Department of Justice to the effect that it is unnecessary for the Court to essay a determination of this far-reaching question in the context of this case.

We believe it is enough to say that even if the Civil Aeronautics Act were construed to affect employment discrimination, the suggestion that this statute pre-empts the field should be repudiated for two reasons: First, because there is no reason why anyone bent upon a successful administration of the Civil Aeronautics Act would find State regulation of discrimination in employment to be a hinderance; and second, because the strongest assertion which may fairly be made on the subject of the relation of the C. A. A. to race discrimination in employment is that such discrimination is *arguably* a peripheral concern of the statute. In this regard the controlling principle is that where the area of possible overlap is one which is merely a peripheral concern of the federal statute, a Congressional intention to exclude state jurisdiction is not to be found. *International Association of Machinists v. Gonzales*, 356 U. S. 617 (1958).

D. Colorado's Program Does Not Interfere With Enforcement of Federal Executive Orders.

The final argument, that there has been federal supersedure of state authority by virtue of executive orders, may be quickly disposed of. Even conceding, *arguendo*, that orders of the executive affect the employment practice here in question, the very fact that the Department of Justice participates in this case on the side of petitioners shows conclusively that the executive charged with the administration of its own orders does not regard the State effort as an interference but rather as an aid in the implementation of a common policy. Under these circumstances the national interest has been defined by the executive to include support for the State regulation, and there is no cause for the Court to make a contrary determination.

Conclusion.

It is unthinkable that the Court which gave the nation *Brown v. Board of Education*, 347 U. S. 483 (1954), would this late in the day turn back the clock and deprive the States of constitutional authority to help Negroes obtain the jobs which have so long been denied them in industries which do business in interstate commerce. Educational opportunity without job opportunity is a fraud. Education without work can yield only bitterness and frustration and inevitably deepens the sense of inferiority suffered by the persons against whom the discrimination is practiced.

The Colorado statute challenged in this case serves a proper purpose for the exercise of the police power and uses means reasonably related to that purpose. The State regulation does not impede the free flow of in-

terstate commerce, as did the passenger regulations in *Morgan and Hall*, but on the contrary removes a costly and wasteful obstruction to the flow of commerce among the states.

Finally, neither the Railway Labor Act, the Civil Aeronautics Act, the Federal Aviation Program Act, nor federal executive orders can fairly be construed to intend to occupy the field of racial discrimination in hiring to the exclusion of the states.

An approach to this problem which would turn the limited efforts of the federal government to shield Negroes from job discrimination into a sword with which to strike down vital efforts of some twenty states to achieve equality in employment is not well calculated to win the respect of mankind for the rule of law in our land.

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December 10, 1962.

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Supreme Court of the United States

JOHN F. DAVIS, CLERK

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION
COMMISSION *et al.*

vs.

Petitioners,

CONTINENTAL AIR LINES, INC.,

Respondent.

No. 492

MARLON D. GREEN,

vs.

Petitioner,

CONTINENTAL AIR LINES, INC.,

Respondent.

**BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI
B'RITH and AMERICAN JEWISH COMMITTEE
as AMICI CURIAE**

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United States Commission on Civil Rights Report (1961) Vol. 1, pp. 208-210, Table 1	22
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Supreme Court of the United States

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No. 146

THE COLORADO ANTI-DISCRIMINATION
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No. 492

MARLON D. GREEN,

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Respondent.

**BRIEF OF ANTI-DEFAMATION LEAGUE OF B'NAI
B'RITH and AMERICAN JEWISH COMMITTEE
as AMICI CURIAE**

INTEREST OF THE AMICI

B'nai B'rith, founded in 1843, is the oldest civic organization of American Jews. It represents a membership of more than three hundred and fifty thousand men and women and their families. The Anti-Defamation League was or-

ganized, in 1913, as a section of the parent organization, in order to cope with racial and religious prejudice in the United States.

The American Jewish Committee, founded in 1906, was incorporated by Act of the Legislature of the State of New York in 1911. Its Charter states:

The objects of this corporation shall be, to prevent the infraction of the civil and religious rights of Jews, in any part of the world; to render all lawful assistance and to take appropriate remedial action in the event of threatened or actual invasion or restriction of such rights, or of unfavorable discrimination with respect thereto . . .

The above entitled matter is one for review of the proceedings and an order of the Colorado Anti-Discrimination Commission directing Continental Air Lines, Inc. to give Marlon D. Green the first opportunity to enroll in its training school for pilots. That order was based on a finding that Continental, having refused to employ Green as an air line pilot because he was a Negro, had violated the Colorado Anti-Discrimination Act of 1957. Continental thereupon sought court review of the Commission's order. The District Court set aside the Commission's cease and desist order and dismissed the complaint on the ground that Continental as an interstate carrier was not subject to the prohibitions of the Colorado Anti-Discrimination Act. The Supreme Court of Colorado affirmed, and this Court granted the petition for a writ of certiorari.

Both the Anti-Defamation League and the American Jewish Committee are gravely concerned with the issues and outcome of this case. One of their primary purposes

is to combat racial and religious prejudice in the United States through the elimination of discrimination against Jews as well as all other racial, religious and ethnic groups which comprise our American people, and to advance good will and mutual understanding and respect among all racial, religious and ethnic groups. Both organizations hold that the welfare and security of Jews in the United States are inseparably related to the preservation of equality of opportunity for all persons; that any denial of such opportunity to members of any racial, religious, or ethnic group is a threat to the status and security of all groups and the individual members thereof.

In keeping with those objectives, the Anti-Defamation League and the American Jewish Committee approve of state legislation against discrimination in employment such as the Colorado Anti-Discrimination Act of 1957, and they support energetic enforcement thereof. They believe that, if the rulings of the courts below are permitted to stand, an important segment of American industry—all interstate carriers and possibly all enterprises engaged in interstate commerce—could evade the mandate of state laws against discrimination in employment. Such a result, in the opinion of the two organizations, is not warranted by the pertinent provisions of the federal Constitution and the acts of Congress, and would greatly weaken and might even stultify the effectiveness of some 21 state laws against discrimination in employment.

The Anti-Defamation League of B'nai B'rith and the American Jewish Committee filed a joint brief as *amici curiae* in this case in the Supreme Court of Colorado. This brief is filed with the consent of the parties.

STATEMENT OF THE CASE

Marlon D. Green, in a complaint to the Colorado Anti-Discrimination Commission, charged that Continental Air Lines, Inc. refused to employ him as a commercial airline pilot solely because he was a Negro, thereby violating the Colorado Anti-Discrimination Act of 1957. Continental denied that it had violated the Act and questioned the jurisdiction of the Commission and the constitutionality of the Act.

The parties to the Commission proceeding entered into a stipulation that Continental was engaged in interstate commerce and that the position of pilot sought by Green involved interstate operations.

The Commission thereupon entered an order requiring Continental to cease and desist from its discriminatory employment practices and give Green the first opportunity to enroll in its training school. Continental filed a petition in the District Court of the City and County of Denver, seeking judicial review of the Commission's order. It alleged that the Colorado Anti-Discrimination Act, as applied to it on the facts in this case, was unconstitutional and void under the provisions of Article I, Section 8, Clause 3 of the United States Constitution, which empowers Congress to regulate commerce among the several states.

District Judge William A. Black held that the Colorado Act may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier. Accordingly, he set aside the findings of the Anti-Discrimination Commission and dismissed the complaint. From that decision the Anti-Discrimination Commission and Green appealed to

the Supreme Court of Colorado which, on February 13, 1962, affirmed the District Court decision. *Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.* — Colo. —, 268 P. 2d 970. This Court granted the petition for a writ of certiorari on October 8, 1962.— U. S. —, 83 S. Ct. 26(3).

THE ISSUE

The issue in this case is whether under federal legislation passed pursuant to the Commerce Clause (Article I, Section 8, Clause 3 of the Federal Constitution) or under the Commerce Clause itself, the State of Colorado is barred from enacting legislation which prohibits interstate carriers operating in the state from discriminating against employees or applicants for employment because of race, creed, color, national origin or ancestry.

SUMMARY OF ARGUMENT

Neither existing federal legislation nor the Commerce Clause of the United States Constitution prevents the State of Colorado from prohibiting discrimination in employment by interstate carriers operating within the state. Congress has not enacted any legislation evidencing a clear intent to pre-empt the field of discrimination in employment by air carriers operating in interstate commerce. In the absence of such clear congressional intent, the state is free to legislate on that subject under its police power, provided that such state regulation does not impose an undue burden on commerce.

State legislation prohibiting employment discrimination in no way burdens commerce. It is completely consistent with established national public policy and functions to facilitate rather than restrict interstate commerce.

Furthermore, the presumption of constitutionality should operate to sustain the Colorado statute.

ARGUMENT

The State of Colorado is not barred by existing federal legislation or by the Commerce Clause of the United States Constitution from prohibiting discrimination in employment by interstate carriers operating in Colorado.

The authority of the state to pass legislation against discrimination based on race, religion, color, ancestry or national origin is not an issue in this case. There is no dispute as to the power of the Colorado legislature under its police power to enact legislation prohibiting discriminatory practices in the state. That power stems from the responsibility of the state to protect the health, safety, morals, well being and tranquility of its people. In fact this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883) said that discriminatory acts by individuals were "within the domain of the State Legislature." The victim of discriminatory conduct was directed by this Court to "resort to the laws of the State for redress." See also, *Nebbia v. New York*, 291 U. S. 502 (1934); *Breard v. City of Alexandria*, 341 U. S. 622, 640 (1951).

In the leading case of *Railway Mail Association v. Corsi*, 326 U. S. 88 (1945), this Court upheld state legislation

against discrimination based on race, religion or ethnic origin as a proper exercise of the police power. The provision there in dispute was Section 43 of the New York Civil Rights Law. That section prohibits labor organizations from refusing membership to an applicant because of race, creed or color or from denying members equal treatment on the same grounds. Civil and criminal sanctions are provided by Section 41 of the same statute. The labor organizations contended that the New York Civil Rights Law violated the Due Process Clause of the Fourteenth Amendment by depriving the organization of its right to select its members and by abridging its property rights and liberty of contract.

This Court rejected that contention, saying:

We have here a prohibition of discrimination in membership or union service on account of race, creed or color. A judicial determination that such legislation violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color. We see no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color or creed by an organization, functioning under the protection of the state, which holds itself out to represent the general business needs of employees (326 U. S. at 93-94).

Mr. Justice Frankfurter in a concurring opinion said:

* * * it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment.—Elaborately to argue against this contention is to dignify a claim

devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the constitution itself exacts. *Id.*, at 98.¹

In 1953 this Court had another occasion to deal with the question of the constitutionality of legislation against discrimination. In *District of Columbia v. Thompson*, 346 U. S. 100, it held that a District of Columbia civil rights ordinance prohibiting discrimination in restaurants constituted a legitimate exercise of the police power vested in the local legislative authority which adopted that ordinance. This Court said:

Certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. *Id.*, at 109.

While not disputing the power of the State of Colorado to enact legislation against discrimination in employment and to vest enforcement jurisdiction in the Colorado Anti-Discrimination Commission, the District Court in its deci-

1. *Railway Mail Association v. Corsi* will be discussed further *infra*, at pages 28-30.

sion, affirmed by the Supreme Court of Colorado, held that under the Commerce Clause of the United States Constitution (Art. I, Sec. 8, Cl. 3), such state legislation could not constitutionally be extended to cover interstate carriers. The Colorado Anti-Discrimination Act of 1957, by its terms, applies to all employers of six or more employees within the state, excepting only certain religious organizations and associations, irrelevant to this case. Since Continental admittedly employs more than six employees within the state, the decisions of the Colorado state courts properly reached the constitutional issue, whether under the United States Constitution the Colorado Anti-Discrimination Act may be applied to Continental, which concededly is an interstate air carrier. Those courts answered that question in the negative by holding the Colorado statute, insofar as it purports to govern the conduct of interstate carriers, to be unconstitutional under the Commerce Clause which vests jurisdiction over interstate commerce in the Congress.²

In reaching that conclusion, the District Court reasoned: 1) that Congress pre-empted the field of discrimination in employment by interstate carriers and 2) that the Colorado Anti-Discrimination Law conflicts with the overriding federal concern in the area of interstate commerce and hence imposes an undue burden on such commerce.

The Supreme Court of Colorado, in its opinion affirming the District Court, expressed complete approval of the District Court's reasoning. "The findings, conclusions and judgment of the trial court might well be adopted *in toto* as the opinion of this court." Transcript of Record, fol.

2. The Congress shall have power * * * to regulate Commerce with foreign Nations and among the several States * * * United States Constitution, Art. I, Sec. 8, Cl. 3.

644, p. 293. The Supreme Court of Colorado then proceeded to discuss a number of decisions of this Court which it said "control the result." Those decisions, however, bear only on the second ground mentioned above. We will discuss both grounds in this brief.³

A. Congress did not pre-empt the field of discrimination in employment by interstate carriers.

Fair employment practice bills have been introduced in every Congress since 1942. Invariably, such bills would have prohibited discrimination in employment on the grounds of race, religion, color, national origin or ancestry by employers, employment agencies and labor organizations. "Employer" necessarily has been defined in these bills as a person engaged in commerce, trade, traffic, transportation or communication among the several states or between any state and any place outside thereof.⁴

No such legislation has been enacted by the Congress. While one such bill passed the House of Representatives, it did not receive the concurrence of the Senate (H. R. 4453, 81st Cong., 2d Sess.). For a legislative history and analysis of efforts to pass fair employment practice legislation, see: Hearings Before the Subcommittee on Labor and Labor Management Relations of the Senate Committee on Labor and Public Welfare, 82nd Cong., 2d Sess., pp. 407-

3. The decision of the Supreme Court of Colorado in this case was discussed in 110 *U. of P. Law Rev.* (May 1962) 1033; 62 *Col. Law Rev.* (Nov. 1962) 1348; and 76 *Harvard Law Rev.* (Dec. 1962) 404. Each of the comments disagreed with the conclusions reached by the court below.

4. E.g. S. 1258, 87th Cong., 1st Sess., introduced March 8, 1961 by Senators Humphrey, Burdick, Douglas, Gruening, Javits, Long (Hawaii), Long (Missouri), McCarthy, Morse, Neuberger, Pastore and Young (Ohio); Secs. 3(b), 3(c), and 5

423. Had federal fair employment practice legislation been passed by the Congress, it would have prohibited discrimination in employment by interstate carriers such as Continental, and in that event perhaps a plausible argument could have been made for the proposition that Congress intended to pre-empt the field. In the absence of such legislation, however, such a contention is baseless.

The doctrine of congressional pre-emption has always been regarded as predicated upon congressional intent. It is justified by the constitutional plan under which Congress is assigned power to regulate interstate and foreign commerce (Art. I, Sec. 8, Cl. 3) and therefore has the power to determine in which field relating to such commerce it wants to reserve for itself the exclusive power of legislation. "[I]n each case the question is one of congressional intent." *Guss v. Utah L. R. B.*, 353 U. S. 1, 10 (1957).

This Court in a leading case said:

Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested. *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766 (1945) and cases cited therein. See also, *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605, 611 (1926).

The opinion of the District Court, affirmed by the Supreme Court of Colorado, relied upon three federal laws as the basis for its statement that "Congress has legislated extensively [sic] in the area of racial discrimination with reference to interstate air transportation and has thereby withdrawn this field from regulation by the several states

• • • • • 1) The Railway Labor Act (45 U. S. C. A.; Secs. 151, 181, *et seq.*); 2) The Civil Aeronautics Act (49 U. S. C. A., Secs. 401 *et seq.*); and 3) The Interstate Commerce Act (49 U. S. C. A., Secs. 1, 301, 901, 1001, *et seq.*). We will discuss those statutes in order.

1. Railway Labor Act

The purposes of the Railway Labor Act are set forth in 45 U. S. C. A., Sec. 151a as follows:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Nowhere in those purposes can be found language that indicates a congressional intent or effort to deal with the problem of discrimination in employment by interstate carriers based on race or color, nor do any of the other provisions of the Railway Labor Act undertake to deal with such discrimination.

The District Court cited a line of cases beginning with *Steele v. Louisville and Nashville R. R. Co.*, 323 U. S. 192 (1944), in support of its conclusion that the Railway Labor Act covers racial and religious discrimination by employers against employees. In *Steele*, this Court held "that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race." *Contey v. Gibson*, 355 U. S. 41, 42 (1957). The Court quite properly reasoned that when by statute the federal government designates a labor organization as the exclusive bargaining agent for a "craft or class of employees," such grant of power is accompanied by a corresponding duty on the agent to represent fairly all members of such "craft or class of employees" and not to discriminate against some because of their race or color. The rationale of those decisions is that the union or bargaining agent cannot be permitted to practice discrimination against the employees whom it is granted exclusive authority to represent, since otherwise the grant of exclusive bargaining power could be misused to oppress members of minority groups.

Those cases deal with the problem of discrimination by labor unions; employers were involved in some of those actions only insofar as they cooperated with the unions to make their racial discrimination effective, e.g., *Brotherhood of R. R. Trainmen v. Howard*, 343 U. S. 768 (1952). No provision of the Railway Labor Act has yet been interpreted by this Court as imposing a direct obligation upon the employing railroads to refrain from discrimination against their employees, let alone applicants for employment. The fallacy of the District Court's argument is apparent when one speculates what would have been the

complainant's prospects had he attempted to use the Railway Labor Act to charge Continental Air Lines with an unlawful employment practice.

None of the cases cited by the District Court for their holdings under the Railway Labor Act supports the interpretation that Congress by enacting that statute evidenced an intention to pre-empt the field of discrimination in employment in interstate commerce. The purpose of the Act is to regulate the relationship between carriers and exclusive bargaining agents and it is only within the context of that relationship that this Court dealt with the subject of racial discrimination by such bargaining agents. The Railway Labor Act, like its prototype, the Labor Relations Act, was intended to and does in fact deal only with one type of discrimination — by employers against employees on the grounds of membership or non-membership in a labor union. It does not cover or purport to cover discrimination by an employer against his employees or prospective employees on the grounds of race or color.

It was expressly to cover that field of employer-employee relationships that the fair employment practice bills discussed above were introduced in Congress.

2. Civil Aeronautics Act

The "discrimination" proscribed by the Civil Aeronautics Act (and its superseding Federal Aviation Program Act, 49 U. S. C. A. (Supp.) Secs. 1301 *et seq.*) is discrimination in service provided by air lines to their customers either by the use of preferential rates or by prejudicial treatment of passengers. 49 U. S. C. A., Sec. 402 (c) spells out the over-all policy of the Act as "the promotion of adequate, economical and efficient service by

air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." (Emphasis added.) Section 484 (b) of the Act expressly describes the kinds of discrimination prohibited. It declares that it is unlawful for any air carrier to:

• • • make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The identical language appears in Section 1374(b) of the Federal Aviation Program Act. The prohibitions against discriminatory conduct are limited to discrimination in service or against passengers.

Section 484(b) was applied in a case in which Pan American World Airways was charged with racial discrimination against four Negro passengers. The United States Court of Appeals for the Second Circuit said that Section 484(b) "is for the benefit of persons, including passengers, using the facilities of air carriers." *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499, 501 (1956). Clearly, discriminatory treatment of passengers on airplanes is directly related to "service" which the Civil Aeronautics Act and the Federal Aviation Program Act were intended to regulate and control.

None of the cited sections of those Acts reflects an intention by Congress to include the field of employment discrimination within the scope of its concern.

The reliance of the District Court on those sections of the Act can be attributed only to a failure to distinguish between discrimination against passengers with respect to service and discrimination against employees or would-be employees with respect to employment.

Nor can an intention on the part of Congress to pre-empt the field of discrimination in employment be inferred from 49 U. S. C. A., Secs. 551-560, also cited by the District Court. Those sections comprise subchapter VI of the Civil Aeronautics Act which is headed "Civil Aeronautics Safety Regulations," and obviously have no bearing on the problem of employment discrimination.

The general regulatory and investigative powers which the statute gives to the Civil Aeronautics Board in Section 425 can be exercised only to carry out its functions and duties under the Act. Since the Act does not evince a congressional intent to regulate or control employment discrimination by air carriers, Section 425 cannot provide such authority.

An examination of the cases cited in the opinion of the District Court to support its pre-emption argument with respect to the Civil Aeronautics Act fails to disclose a single case in which the Act was held applicable to employment discrimination by air carriers. For example, the Court cited *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 132 F. Supp. 871 (1955) in which the Village of Cedarhurst, Long Island was held to be powerless to regulate air flights over its territory because federal aeronautics statutes have pre-empted that aspect of air commerce. It is difficult to see how such a decision buttresses the proposition that Congress, by enacting the Civil Aeronautics Act, intended to pre-empt the field of employment discrimination.

3. Interstate Commerce Act

By its terms, the Interstate Commerce Act does not apply to air carriers. 49 U. S. C. A., Secs. 1, *et seq.*, cover the transportation of passengers or property "wholly by railroad, or partly by railroad and partly by water * * *." Secs. 301, *et seq.* cover "the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce * * *." Secs. 901, *et seq.* cover "the transportation by water in interstate or foreign commerce of passengers or property * * *." Secs. 1001, *et seq.* cover "freight forwarders."

In any case, the Interstate Commerce Act does not presume to deal with discrimination in employment. 49 U. S. C. A., Sec. 3 (1) contains a provision making it unlawful for any "common carrier," as defined in the statute, "to make, give, or cause any undue or unreasonable preference or advantage to any particular person * * * or any particular description of traffic, in any respect whatsoever; or to subject any particular person * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *." That section by its terms applies to discrimination in service and was held by this Court to prohibit discrimination by rail carriers against passengers. *Henderson v. United States*, 339 U. S. 816 (1950); *Mitchell v. United States*, 313 U. S. 80 (1941). That section has never been held applicable to employment discrimination.

4. Executive Orders

The District Court sought to find support for its claim of federal pre-emption by reference to Executive Orders, No. 10479, August 13, 1953, and No. 10557, September 3, 1954. Both of those orders have since been superseded by

Executive Order No. 10925, promulgated by President Kennedy on March 8, 1961—26 F. R. 1977. That order, like its predecessors, requires all federal departments, agencies and corporations to insert in their contracts and agreements a clause by which the contractor undertakes not to engage in discrimination in employment in connection with work or services to be performed under the contract. The order also sets forth machinery to insure performance of the contractual obligation. Executive Order No. 10925, like its predecessors, did not and could not impose a statutory obligation upon government contractors or subcontractors not to discriminate in employment on grounds of race. An employer who does not enter into a government contract is under no legal obligation not to discriminate. The obligation of an employer who enters into a government contract containing a non-discrimination clause is purely contractual. That technique is necessary because of the absence of any federal legislation imposing a statutory obligation upon employers engaged in commerce not to discriminate in their employment policies. It is the absence of such federal legislation which negates the argument that the Congress has pre-empted the field.

Furthermore, an executive order is not an act of Congress and consequently cannot serve to establish any congressional intent which is the basis for the pre-emption doctrine.

Thus, we see that the Railway Labor Act, the Civil Aeronautics Act and the Interstate Commerce Act did not, and the various Executive Orders discussed above could not, evidence a congressional intent to pre-empt the field of discrimination in employment by employers engaged in commerce. Of course, Congress could have pre-empted the

field by enacting a federal fair employment practice law with a statement of intention to bar the application of state legislation to interstate commerce. But to date, as noted above, Congress has not taken such action. See also, *Railway Mail Association v. Corsi*, *supra*, at 97.

Assuming *arguendo*, that a congressional intent to regulate racial or religious discrimination in employment by interstate air carriers could be read into one or more of the federal acts discussed above, such regulation could only take the form of a prohibition on discrimination.⁶ Such a federal regulation would not evince a "congressional purpose incompatible" with the purpose of the Colorado Anti-Discrimination Law since both would seek to prohibit racial and religious discrimination in employment. A finding of such incompatibility is necessary before a state statute may be ruled to be superseded by a federal measure dealing with the same subject matter. *De Veau v. Braisted*, 363 U. S. 144, 153 (1960). Certainly, if the objective of a congressional measure were to eliminate discrimination in employment, a state fair employment practice act would not constitute a "frustration" of congressional policy. *Ibid*.

Such state and federal measures, far from contradicting each other and thus precluding both from functioning together, would supplement each other as do state and federal labor relations acts. *Ibid*. See also, *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 749-50 (1942); *Buck v. California*, 343 U. S. 99, 102, and cases there cited (1952).

6. A federal act requiring such discrimination would violate the 5th Amendment which this Court has said includes a guarantee of equal protection of the laws. *Bolling v. Sharpe*, 347 U. S. 497, 500 (1954); *Hurd v. Hodge*, 334 U. S. 24, 35-36 (1948).

B. There is no conflict between the Colorado anti-discrimination law and the federal concern in the area of interstate commerce.

The absence of federal legislation evidencing a clear intent to pre-empt the field of discrimination in employment in interstate commerce does not end our inquiry. State legislation affecting interstate commerce may be barred by the Commerce Clause of the United States Constitution even though Congress has not spoken on the subject-matter of such state legislation.

In seeking to determine whether the Commerce Clause, in the absence of federal legislation, bars state regulation, the courts have long recognized that the several states may regulate matters of local concern over which federal authority has not been exercised (*Cooley v. Bd. of Wardens*, 12 How. 299, 320 (1851)), even though the state regulation may have some impact on interstate commerce. State laws, such as "quarantine measures, game laws, and like local regulations of rivers, harbors, piers and docks" have been sustained "even though they materially interfere with interstate commerce." That applies particularly to measures which "must be applied alike to intrastate and interstate traffic." *Southern Pacific Co. v. Arizona*, *supra*, 783. "The only requirements consistently recognized have been that the [state] regulation not discriminate against . . . interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions." *Cities Service G. Co. v. Peerless O. and G. Co.*, 340 U. S. 179, 186-7 (1950); *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 40 (1948).

1. *The interest of the state of Colorado in preventing discrimination in employment and the national interest*

For many years, the State of Colorado has pursued a consistent policy against racial and religious discrimination. That interest in granting every citizen equal opportunity has found expression in a number of legislative enactments. Law of 1895, prohibiting discrimination in places of public accommodation, resort or amusement; Law of 1917, prohibiting discriminatory advertising; Law of 1953, prohibiting discrimination in employment; Anti-Discrimination Act of 1957; the Colorado Fair Housing Act of 1959.⁷

The Anti-Discrimination Act of 1957 is the statute at issue in this case. It bars discrimination based on race, creed, color, national origin or ancestry by employers against employees or applicants for employment. Its prohibition is directed against discriminatory practices carried on by employers within the State of Colorado. The Colorado Anti-Discrimination Commission was set up to administer that law. In the exercise of its jurisdiction, the Commission found that Continental engaged in discriminatory and unfair employment practices in Colorado against Green and thus violated the Colorado Anti-Discrimination Act.

There is certainly no national policy opposed to the state interest in preventing discriminatory employment practices within the State of Colorado; rather, the con-

7. Recently upheld by the Supreme Court of Colorado as a legitimate exercise of the state's police power. *Colorado Anti-Discrimination Commission, et al. v. Case, et al.*, Docket No. 19988, — Colo. —, decided December 17, 1962.

trary is true. A large number of states have enacted laws against discrimination in employment, in places of public accommodation, education, housing, etc. *1961 United States Commission on Civil Rights Report*, Vol. 1, pp. 208-210, Table 1. Such legislation has been upheld by this Court as a proper exercise of the state's police power. *Railway Mail Association v. Corsi*, *supra*; *District of Columbia v. Thompson*, *supra*.

The interest of the State of Colorado in preventing discriminatory employment practices within the state does not conflict with any "national interest which overrides the interest of [Colorado] to forbid the type of discrimination practiced here." *Bob-Lö Excursion Co. v. Michigan*, *supra*, at 40. On the contrary, the objective of the Colorado Anti-Discrimination Act—elimination of racial and religious discrimination—is also a national objective. The public policy of the United States is clearly directed against racial and religious discrimination in all its aspects. That policy, which may "be ascertained by reference to the laws and legal precedents," *Muschany v. U. S.*, 324 U. S. 49, 66 (1945), finds expression not only in the Fifth and Fourteenth Amendments, but also in the Civil Rights Statutes enacted in 1866, 14 Stat. 27; 1867, 14 Stat. 546; 1870, 16 Stat. 140; 1871, 17 Stat. 13; 1875, 18 Stat. 335; 1957, 71 Stat. 634; and 1960, 74 Stat. 86; and in numerous Executive Orders, including E. O. No. 11063 prohibiting discrimination in federally-aided housing, issued November 20, 1962, as well as the Executive Orders discussed *supra*. Of the many decisions of this Court recognizing and enforcing that public policy, it is sufficient to note *Bolling v. Sharpe*, *supra*, and *Hurd v. Hodge*, *supra*.

Hence, the Colorado Anti-Discrimination Act "safeguard[s] an obvious state interest"—the interest to bar

discriminatory employment practices—and there is no “national interest . . . in the prevention of [such] state restrictions.” *Cities Service G. Co. v. Peerless O. and G. Co.*, *supra*, at 186-7. That Act contains “nothing out of harmony, much less inconsistent, with our federal policy.” *Bob-Lo Excursion Co. v. Michigan*, *supra*, at 37.

It should be noted that the absence of federal legislation prohibiting discrimination in employment does not permit the conclusion that there is a national interest in protecting the discriminatory employment practices of persons engaged in interstate commerce. “Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation.” *Cities Serv. G. Co. v. Peerless O. and G. Co.*, *supra*, at 187, and cases cited therein.

2. The Colorado Anti-Discrimination Act does not constitute a burden on commerce.

In discussing the relative weight to be given to national and state concerns, this Court has barred the states from exercising legislative authority “to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.” *Southern Pacific Co. v. Arizona*, *supra*, at 767. State legislation impeding the “free flow of commerce” has been characterized as “an unconstitutional burden” or an “undue burden” on commerce. *Bibb v. Navajo Freight Lines*, 359 U. S. 520, 529 (1959); *Morgan v. Virginia*, 328 U. S. 373, 377 (1946).

"Burdens upon commerce" have been defined by this Court as "those actions of a state which directly impair the usefulness of its facilities for such traffic." *Morgan v. Virginia, supra*, at 380. No lengthy exposition is required to establish that a state law against discrimination in employment has no adverse effect, directly or indirectly, upon the facilities of commerce by land, water or air. The Colorado Anti-Discrimination Act prohibits employers, including those hiring employees for interstate transportation (such as airplane pilots), from using the irrelevant criteria of race, color, religion or national origin in determining whom to hire for a particular job. The effect of that ban is to widen the recruitment reservoir so that the employer can more easily hire the person best qualified to fill the job, be he white or Negro, Protestant, Catholic or Jew.

Certainly, a state statute which encourages the hiring of airplane pilots solely on the basis of experience and qualifications cannot be deemed a burden on interstate commerce. On the contrary, such a state law tends to promote air traffic and safety by assisting in the recruitment of the best qualified pilots; it requires the removal of restrictions and burdens from commerce insofar as the field of employment is concerned.

In 1963 it is no longer possible to argue that a Negro pilot hired in Colorado to fly a commercial air liner interstate could not, because of his race, land and take off in any state in the United States. No state prohibits the employment of persons because of their race; any state statute, regulation or administrative action attempting to do so would patently violate the Equal Protection Clause of the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U. S. 1

(1948); *Brown v. Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955); *Cooper v. Aaron*, 358 U. S. 1, 17 (1958); *Bailey v. Patterson*, 369 U. S. 31 (1962). Hence, there could be no confusion resulting from conflicting state laws in that respect.

The opinions below rely heavily on *Hall v. DeCuir*, 95 U. S. 485 (1878) in which this Court struck down as an unconstitutional burden on interstate commerce a Louisiana statute prohibiting segregation among passengers on boats plying the Mississippi River. In that case, this Court pointed out that the Mississippi River touched ten different states and that if each state were at liberty to regulate the conduct of carriers while within its jurisdiction, "the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship." The Court stated that no carrier of passengers could "conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a state line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate." *Hall v. DeCuir*, *supra*. The Louisiana statute was invalidated as imposing "a direct burden on interstate commerce."

That decision of 1878 does not control the case at bar.

First, it deals with a state law prohibiting segregation of passengers, not with a statute prohibiting discrimination in employment. The reasoning of the courts below on the question of interference with commerce arises from a confusion of the problem of discrimination in servicing passengers with that of discrimination in employment. We are in full agreement with *Morgan v. Virginia*, *supra*; *Chance v. Lambeth*, 186 F. 2d 879 (1951); *Pryce v. Swedish*

American Lines, 30 F. Supp. 371 (1939); *Fitzgerald v. Pan American World Airways*, *supra*, cited by one or both of the courts below. They teach that state action which discriminates against passengers on interstate carriers constitutes a direct burden on interstate traffic. That is also why Congress in various statutes dealing with interstate carriers has prohibited discriminatory treatment of passengers. (Civil Aeronautics Act, 49 U. S. C. A., Secs. 402(e), 484(b); Federal Aviation Program Act, 49 U. S. C. A. (Supp.), Sec. 1374(b); Interstate Commerce Act, 49 U. S. C. A., Sec. 3(1).)

The second reason that *Hall v. DeCuir* is not sound precedent for the case at bar is that it was predicated upon the situation prevailing in the southern states in 1878—before the Constitution was interpreted to bar state statutes requiring racial segregation. *Brown v. Board of Education*, *supra*, and *Gayle v. Browder*, 352 U. S. 903 (1956), overruling *Plessy v. Ferguson*, 163 U. S. 537 (1896). Hence, the diversity among state laws in 1878 governing racial segregation of passengers was in fact a burden on commerce. Today, such a diversity of state legislation is impossible. "We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. *Morgan v. Virginia* (*supra*); *Gayle v. Browder* (*supra*); *Boynton v. Com. Virginia*, 364 U. S. 454 (1960) * * *. The question is no longer open; it is foreclosed as a litigable issue." *Bailey v. Patterson*, *supra*, at 33. Hence, a state statute prohibiting segregation on interstate carriers, like the Louisiana statute involved in *Hall v. DeCuir*, can not create confusion or constitute a burden on commerce today.

The Supreme Court of Colorado sought to save *Hall v. DeCuir* as a viable precedent by referring to *Morgan v. Virginia, supra* and *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960), both of which cited *Hall v. DeCuir* with approval.

In the *Huron Portland Cement* case this Court upheld a provision of Detroit's smoke abatement code under which a steam vessel engaged in commerce was required to make structural alterations in order to comply with the city's smoke abatement program. This Court cited *Hall v. DeCuir* as one of a series of precedents for the proposition that "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary" (362 U. S. at 444), but held that the Detroit measure was not such a burden.

Hall v. DeCuir stands for two legal propositions: 1) a state may not impose a burden on interstate commerce in areas where uniformity of regulation is essential; 2) a state law which prohibits racial segregation of passengers in commerce is such a burden when racial segregation is required in the surrounding states. *Hall*, along with many other cases, remains a precedent for the first proposition and it was solely in that context that this Court cited *Hall* in the *Huron Portland Cement* case. However, as authority for the second proposition, *Hall* has been "eroded and devitalized" since surrounding states may no longer require racial segregation of passengers in interstate commerce. *Brown v. Board of Education, supra*; *Gayle v. Browder, supra*; *Morgan v. Virginia, supra*; *Bailey v. Patterson, supra*. Yet it was this obsolete aspect of *Hall v. DeCuir* which was relied upon by the Supreme Court of Colorado when it held that the Colorado Anti-Discrimina-

tion Act, as applied to Continental, imposed an undue burden on commerce.

Similarly, the Supreme Court of Colorado should have derived little comfort from this Court's citation of *Hall v. DeCuir* in *Morgan v. Virginia*. *Morgan* cited *Hall* for the proposition that a state statute dealing with segregation of passengers in commerce may not disturb the uniformity required to permit the free flow of passengers in interstate transportation. It was for that reason that the Virginia statute requiring racial segregation on motor carriers was struck down as a burden on commerce. Today, even more so than when *Morgan v. Virginia* was decided in 1946, the uniformity required for interstate commerce can be only the uniformity which is implicit in the equality of all people before the law, without regard to race or religion. *Brown v. Board of Education*, *supra*; *Bailey v. Patterson*, *supra*.

C. The Corsi case

In a discussion of the relationship between the congressional powers set forth in Article I, Section 8 and the legislative powers of states, the case of *Railway Mail Association v. Corsi*, *supra*, provides important guidance. That case dealt with the validity, under the federal Constitution, of a New York State law prohibiting racial and religious discrimination by labor unions against applicants for membership. The unanimous opinion of this Court first upheld that statute against the charge that it violated the Due Process Clause of the Fourteenth Amendment. That aspect of the decision has been discussed above on pages 6-8. Next, this Court rejected the argument that the New York statute denied the petitioner (the Railway

Mail Association) the equal protection of the laws by subjecting it to Section 43 of the State Civil Rights Law prohibiting discrimination while denying it, as an organization of federal employees, certain benefits granted other labor organizations under the New York Labor Law. That aspect has no bearing on the case at bar.

Finally, this Court considered the contention that Section 43 is "repugnant to Article I, Section 8, Clause 7 of the federal Constitution which confers on Congress the authority over postal matters; that Section 43 constitutes an invasion of this field over which Congress has exclusive jurisdiction and constitutes an attempt to regulate a federal instrumentality." *Railway Mail Association v. Corsi*, *supra*, at 95. Thus, the Railway Mail Association sought to use the Postal Clause of the federal Constitution to invalidate Section 43 just as the courts below sought to use the Commerce Clause in the instant case to invalidate the Colorado Anti-Discrimination Act as applied to hiring practices of interstate carriers.

In rejecting the contention that Section 43 of the New York Civil Rights Law is repugnant to the Postal Clause, this Court discussed both the argument that Section 43 imposed an undue burden on the federal government's postal functions and the argument that the government by federal legislation pre-empted and fully occupied the field regulated by Section 43 of the New York law. Those arguments are closely analogous to the two grounds on which the courts below held the Colorado Anti-Discrimination Act unconstitutional.

Rejecting the undue burden argument, this Court said that:

The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. *Id.*, at 96.

Turning to the pre-emption argument, this Court examined the provision of 5 U. S. C. A., Sec. 652 which, it was argued, constituted a complete occupation of the field by federal legislation. That provision, as read by the Court, prohibited discrimination against a federal employee based on his membership in an organization of postal employees. The Court said that that provision

• • • can hardly be deemed to indicate an intent on the part of Congress to enter and completely absorb the field of regulation of organizations of federal employees. Congress must clearly manifest an intention to regulate for itself activities of its employees which are apart from their governmental duties, before the police power of the state is powerless • • • There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded. *Id.*, at 97.

D. The presumption of constitutionality of state laws

The District Court in its opinion, which was affirmed by the Supreme Court of Colorado, held that under the

Commerce Clause of the Constitution, the Colorado Act prohibiting employment discrimination because of race, creed, color, national origin or ancestry, despite its broad language, "may not constitutional" be extended" to cover employment practices of interstate carriers with respect to flight crew personnel. That decision is a declaration that the Act is unconstitutional to the extent that it requires interstate carriers to refrain from engaging in racial or religious employment discrimination within the state.

Both federal and state courts recognize the existence of a presumption in favor of the constitutionality of a state law. It is long settled that a state law may be invalidated as unconstitutional only if its repugnance to the fundamental law is clear and beyond reasonable doubt. *Madden v. Kentucky*, 309 U. S. 83, 88 (1940); *Ogden v. Saunders*, 12 Wheat 213, 270 (1827).

We have shown that the federal Constitution does not bar the State of Colorado from including in the coverage of its Anti-Discrimination Act discriminatory employment practices of interstate carriers operating within the state. But were that conclusion in doubt, the Act and its applicability to interstate carriers must be upheld under the presumption of constitutionality.

CONCLUSION

**The decision of the Supreme Court of Colorado
should be reversed.**

Respectfully submitted,

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OCTOBER TERM, 1962
No. 146

THE COLORADO ANTI-DISCRIMINATION
COMMISSION, *et al.*,

Petitioners,

against

CONTINENTAL AIR LINES, INC.,

Respondent.

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK, JOINED BY THE ATTORNEYS GEN-
ERAL OF THE STATES OF ALASKA, ILLINOIS, IN-
DIANA, KANSAS, MASSACHUSETTS, MICHIGAN, MIN-
NESOTA, MISSOURI, NEW JERSEY, OHIO, OREGON,
PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND
WISCONSIN, AS AMICI CURIAE IN SUPPORT OF
REVERSAL**

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION, *et al.*,
Petitioners,
against

CONTINENTAL AIR LINES, INC.,
Respondent.

**BRIEF OF THE ATTORNEY GENERAL OF THE STATE
OF NEW YORK, JOINED BY THE ATTORNEYS GEN-
ERAL OF THE STATES OF ALASKA, ILLINOIS, IN-
DIANA, KANSAS, MASSACHUSETTS, MICHIGAN, MIN-
NESOTA, MISSOURI, NEW JERSEY, OHIO, OREGON,
PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND
WISCONSIN, AS *AMICI CURIAE* IN SUPPORT OF
REVERSAL**

Interest of the *Amici*

The State of New York, in 1945, established the first administrative agency in the nation seeking to eliminate and prevent discrimination in employment based on race, creed, color or national origin, with the creation of the State Commission Against Discrimination.¹ Since that date, nineteen other States have established anti-discrimination agencies, modeled largely on the New York statute.²

State anti-discrimination laws are born out of a conviction that practices of discrimination because of race, creed, color or national origin menace the institutions and foundation of a free democratic state and threaten the peace, order, and general welfare of the state and its inhabitants. It is not to be concluded lightly that a state lacks power

¹ N. Y. Sess. Laws 1945, ch. 118.

² A list of anti-discrimination laws administered by state agencies in twenty states is set forth in the Appendix to this brief.

to enforce its standards of equality with respect to any group of employers hiring within its borders.

The jurisdiction of the state anti-discrimination agencies has been seriously challenged by the decision of the Supreme Court of Colorado in the above-captioned case, holding that the states are powerless to act with respect to racial discrimination in the hiring practices of interstate air carriers.

Continental Air Lines, Inc., the respondent in the case at bar, has its principal offices in Colorado. Colorado is the hub of its managerial activity. It is to Colorado that applicants for employment are brought for interview, and it is in Colorado that they are hired. The holding that the State of Colorado may not validly subject such hiring practices to its standards of equality of employment opportunity strikes at the heart of state police power.

This decision by the highest Court of a sister State not only casts doubt as to the jurisdiction of state anti-discrimination commissions over interstate carriers, hitherto a settled administrative construction of the state laws, but also may encourage claims of immunity by employers in other industries engaged in interstate commerce. Industry and commerce do not stop at political boundaries, and vast sectors of the economic activity within any single state jurisdiction are affected with an interstate character. A wide area of hiring practices unaffected by anti-discrimination laws could result from the doctrine espoused by the Supreme Court of Colorado. There is no evidence that such immunity was intended by Congress, nor that Congress intended thus to frustrate a state trying to promote within its borders an equality of access to jobs irrespective of race, creed, color or national origin.

In recognition of the challenge to the jurisdiction of their anti-discrimination commissions posed by the Colorado decision now on review before this Court, the States of New York, Alaska, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey,

Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin, having statutes similar to the Colorado Act here in issue, jointly file this brief in support of the petitioners in accordance with Rule 42 of this Court.

Questions Presented

Does a state statute prohibiting discriminatory hiring practices within the state impose an unconstitutional burden on commerce when applied to an interstate air carrier?

Is a state precluded by federal statute or executive order from prohibiting an interstate air carrier to discriminate in hiring practices within the state?

POINT I

The application of the Colorado Anti-Discrimination Act to the hiring practices of an interstate air carrier does not unconstitutionally burden interstate commerce.

A. The Colorado Anti-Discrimination Act is a valid exercise of the state's police power. As applied here, it imposes no actual burden on interstate commerce.

It is settled doctrine that the commerce clause of the Federal Constitution does not rob states of their sovereign power to legislate for the general welfare, even though such state legislation may incidentally affect the operations of instrumentalities of interstate commerce.

"[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the states to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U. S. 761 at 767 (1945); see also *Hutton Cement Co. v. Detroit*, 362 U. S. 440, 443-444 (1960); *Parker v. Brown*, 317 U. S. 341, 359-360 (1943); *California v. Thompson*, 313 U. S. 109, 113-114 (1941) and cases cited; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 185-191 (1938) and cases cited.

The principle was stated nearly a century ago in *Sherlock v. Alling*, 93 U. S. 99, 103-104 (1876), as follows:

"In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution . . . [A]nd it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit."

The vigor of this doctrine has been demonstrated again and again in connection with the exercise of the State's police power to regulate conditions of employment on interstate carriers. This Court has frequently sustained such regulations in precedents which have a compelling similarity to the case at bar. Thus, in *Smith v. Alabama*, 124 U. S. 465 (1888), a state statute requiring the licensing of locomotive engineers as a safeguard against employees of reckless or intemperate habits was affirmed as applied to the engineer of an interstate train. This Court similarly sustained state statutes defining the size of crews manning interstate trains, *Chicago R. I. & P. Ry. Co. v. Arkansas*, 219 U. S. 453 (1911); *Missouri Pac. R. R. v. Norwood*, 283 U. S. 249 (1931), requiring eye examinations for engineers of interstate trains, *Nashville C. & St. L. Ry. v. Alabama*, 128 U. S. 96 (1888), prescribing regulations for the payment of wages of employees of interstate railroads, *Erie R. Co. v. Williams*, 233 U. S. 685 (1914), and requiring interstate trains to be equipped with cabooses for the benefit of rail-

road employees, *Terminal Railroad Ass'n. v. Trainmen*, 318 U. S. 1 (1943).

In each of these cases, an evil existed which the State sought to remedy by a regulatory statute which in some measure affected interstate commerce. In the *Erie* and *Terminal* cases, *supra*, the result of the statute was to increase the costs of operating an interstate carrier. The effect of the full train crew statutes was to require the carriers to hire in certain states additional employees whom they claimed they did not need. Yet, in each case, the state regulation was sustained in recognition of the local interest in protecting the welfare and safety of both employees and the general public.

The denial of equal economic opportunities and advantages to individuals because of their color is an evil which the state clearly has as much interest in abolishing as the evils sought to be remedied in the above cited cases. The validity of the state legislation against discrimination in employment based on race, creed, color or national origin is no longer subject to dispute and indeed, is not challenged in the present case. In *Railway Mail Ass'n v. Corsi*, 326 U. S. 88 (1945), this Court, in sustaining the application of a section of the New York Civil Rights Law prohibiting racial discrimination in union membership, rejected the contention that a state anti-discrimination law violated the Fourteenth Amendment as a "distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U. S. at page 94. As stated by Mr. Justice Frankfurter in a concurring opinion (at p. 98):

" . . . a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt."

It should be noted that in the *Corsi* case, this Court sustained the application of a state anti-discrimination statute

to a postal mail clerks' labor organization composed solely of federal employees. This Court, in rejecting the contention that the state statute interfered with the exclusive federal control of the postal service, said as to the New York law (326 U. S. at p. 96): "It does not burden the government in its selection of its employees or in its relations with them."

A state anti-discrimination law is not a burden on the postal service, Congress' exclusive domain; and we submit that it is not a burden on interstate commerce.

By a practical test, there is no actual burden on the respondent resulting from the necessity for its compliance with the Colorado Anti-Discrimination Act.

The anti-discrimination statute, unlike the statutes involved in the aforementioned railroad cases (*Smith, Chicago, Missouri, Nashville, Erie and Terminal, supra*), does not even increase the operating costs of the interstate air carrier, nor in any manner impair the usefulness of the respondent's facilities for air traffic. Nor does the Colorado statute require the respondent to hire men it does not need (unlike the contentions made in the full crew cases). The employer retains the right to decide whether to hire, how many to hire, and when to hire. Colorado only requires the employer, when hiring within the state, to eliminate discrimination based on race, creed, color or national origin in its choice of applicants.

The anti-discrimination statute, unlike the statutes involved in the aforementioned railroad cases (*supra*), is not aimed only at carriers. The Colorado statute applies alike to all employers of six or more employees who conduct hiring practices within the state, Colo. Rev. Stat. Ann., §§ 80-24-2(5) (1960 Supp.); and it is not suggested nor can it be suggested that it discriminates against interstate commerce.

This Court has sustained a variety of state regulations of conditions of employment on interstate carriers, as

shown above. *A fortiori*, it is submitted that the application of a state law to eliminate discrimination in employment, which imposes no cost or other actual burden on such carriers, should be sustained.

If the application of the Colorado statute in the instant case has any effect, it will be to *aid*, rather than to burden commerce, by facilitating the removal of arbitrary barriers preventing individuals with special skills and training from serving the instrumentalities of interstate commerce.

B. The Colorado Anti-Discrimination Act does not and cannot destroy uniformity in the regulation of interstate commerce.

The Supreme Court of Colorado based its decision that the application of the Colorado Anti-Discrimination Act was invalid upon the proposition that "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States." 368 P. 2d 970, at p. 973.

Even if the Court's proposition were valid with respect to the regulation of racial discrimination against interstate passengers, the subject of the cases relied on by the Court—*Hall v. De Cuir*, 95 U. S. 485 (1878), and *Morgan v. Virginia*, 328 U. S. 373 (1946)³—it could not govern with respect to applicants for employment, since the law of the state where an employment contract is made is honored throughout the nation. *Moore v. Illinois Central R. Co.*, 136 F. 2d 412 (5th Cir. 1943); *Hansen v. Arabian American Oil Co.*, 195 F. 2d 682 (2d Cir. 1952), cert. den. 344 U. S. 828 (1952).

Assuming *arguendo*, however, that uniformity is a constitutional test in this case, there is nevertheless no basis

³ It may be noted that the factual burden which was present in the *Hall* and *Morgan* cases, *supra*, resulting from the existence of conflicting state laws respecting segregation of passengers on carriers, is no longer possible in view of recent decisions. *Bailey v. Patterson*, 369 U. S. 31, 33 (1962); *Gayle v. Browder*, 352 U. S. 903 (1956), affirming 142 F. Supp. 707 (M. D. Ala. 1956).

for holding that the application of a state anti-discrimination statute to the hiring practices of an interstate carrier within the States operates to disrupt the required uniformity in interstate commerce.

Nothing in the record of the present case suggests that the application of the Colorado law is subjecting the respondent carrier to diverse state requirements. See *Huron Cement Co. v. Detroit*, 362 U. S. 440, 448 (1960).

Nor could the application of the Colorado statute be invalidated under the commerce clause through mere speculation concerning the possibility of future conflicts with the laws of other jurisdictions. In *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28 (1948), an operator of an excursion boat, admittedly engaged in foreign commerce between Detroit and a Canadian amusement park, was convicted under a Michigan anti-discrimination law for refusing passage to a Negro. In sustaining the conviction, this Court dismissed the possibility that Canada might adopt regulations in conflict with Michigan's as "so remote that it is hardly more than conceivable" (p. 37).

But the complete answer to the Colorado Court's *ratio decidendi* is that in the instant case, the possibility of diverse state regulations affecting racial discrimination in employment is not only remote, but is constitutionally impossible. The states may validly act to bar racial discrimination in employment. *Railway Mail Ass'n v. Corsi*, 326 U. S. 88 (1945). Conflicting state legislation requiring discrimination in employment based on race, creed or national ancestry would clearly be proscribed by the Fourteenth Amendment. As this Court stated in *Truax v. Raich*, 239 U. S. 33, 41 (1915):

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Cases cited] If this could be refused solely upon the ground of

race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

See also *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948). Nor may state assistance be invoked either directly or indirectly to enforce or effectuate private discrimination. *Shelley v. Kraemer*, 334 U. S. 1 (1947); *Barrows v. Jackson*, 346 U. S. 249 (1953); *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961):

In determining whether a local law had imposed an undue burden on interstate commerce, this Court recently had occasion to restate the applicable principle as follows:

"State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity may constitutionally stand." *Huron Cement Co. v. Detroit*, 362 U. S. 440, 448 (1960).

The Colorado statute against discrimination in employment is based on the police power and neither discriminates against interstate commerce nor operates to disrupt its required uniformity. Hence, it may constitutionally be applied to an interstate employer.

POINT II

Colorado is not precluded by federal legislation or executive order from prohibiting discrimination in employment by an interstate carrier hiring within the state.

No claim has been made, nor can be made, that the Colorado Anti-Discrimination Act conflicts with or is inconsistent with any provision of a federal law or regulation.

However, an erroneous contention has been made in behalf of respondent that the federal government has manifested an intention to preempt the area of regulation here in issue to the exclusion of the states.⁴

Before proceeding to the specific statutes and orders which are claimed to indicate the alleged intent, a brief review of the applicable principles of law would be in order.

A. The intent of the Federal Government to abridge or displace the police power of the states must be clearly shown.

The precedents in this Court establish that preemption by the Federal Government may not be inferred in areas of local concern where the state has power to regulate for the general welfare unless such an intent is clearly manifested.

This principle was applied in the one other case reviewed by this Court involving the question of federal power versus a state law against discrimination in employment. *Railway Mail Ass'n v. Corsi*, 326 U. S. 88 (1945). There this Court upheld the application of a section of the New York Civil Rights Law prohibiting labor organizations from denying membership to any person because of his race, color or creed as applied to an organization of postal clerks of the United States Railway Mail Service. In addition to rejecting the argument that the application of the law was an invalid interference with Congressional authority over postal matters, the Court dismissed the contention that various federal statutes regulating the terms and conditions of employment of railway mail clerks indicated an intent on the part of Congress to occupy completely the field of regulation of federal postal employees and their labor organizations.

⁴ The Supreme Court of Colorado did not reach this question, having disposed of the case on another ground. The lower court in Colorado considered the question and concluded that the respondent's position was sound (Record, pp. 257-287).

The Court concluded (p. 97):

"Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties; before the police power of the state is powerless. *Allen-Bradley Local v. Wisconsin Board*, 315 U. S. 740, 749, and cases cited. There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded."

The same principle was recently illustrated in *Huron Cement Co. v. Detroit*, 362 U. S. 440 (1960), where both the federal government and the City of Detroit inspected the boilers aboard vessels operating in interstate commerce—the federal government, for safety and the City, for air pollution. In the case reaching this Court, the federal inspectors had approved the boilers, while the City held them defective. This Court rejected the claim of preemption and sustained the application to the interstate vessel of the criminal provisions of the local smoke abatement ordinance, expressing its adherence to "the teachings of this Court's decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists." 362 U. S. at 446. This Court stated (p. 443):

"In determining whether state regulation has been preempted by federal action, 'the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.' *Savage*

v. *Jones*, 225 U. S. 501, 533. See also *Reid v. Colorado*, 487 U. S. 137; *Asbell v. Kansas*, 209 U. S. 251; *Welch Co. v. New Hampshire*, 306 U. S. 79; *Maurer v. Hamilton*, 309 U. S. 598."

Even if the federal law does extend to regulation of the specific area which is covered by the state law and seeks to achieve an identical result, it may not be inferred that the federal government intended to make its jurisdiction exclusive unless such an intention is clearly manifested. For example, in *De Veau v. Braisted*, 363 U. S. 144 (1960), this Court held that § 8 of the New York Waterfront Commission Act, which disqualified certain convicted felons from holding office in any waterfront labor organization, was not preempted by the Labor-Management Reporting and Disclosure Act of 1959 although Congress in that Act had imposed a similar restriction. The Court stated (p. 156):

"The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8, namely, disqualifications of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies."

A test of the issues in the instant case against the foregoing principles leads to only one conclusion, as the following pages will show: that the application of the Colorado Anti-Discrimination Act to the hiring practices of interstate carriers serves only to support, rather than to conflict or interfere with, a national policy dedicated to eliminating discrimination in employment; and that there is no evidence that the federal government has intended to preempt this field of regulation, where the enormity of the problem suggests the urgent need for supplementary efforts by the states. Cf. *California v. Zook*, 336 U. S. 725, 737 (1949).

B. Neither the Railway Labor Act nor the Civil Aeronautics Act precludes state action with respect to discriminatory hiring practices by air carriers.

The contention that the Railway Labor Act and the Civil Aeronautics Act manifest an intent by Congress to exclude the states from applying their anti-discrimination law to interstate carriers is patently erroneous.

In enacting the Railway Labor Act,⁵ certain provisions of which apply to air carriers (45 U.S.C. §§ 181-188), Congress sought "to provide a framework for peaceful settlement of labor disputes between carriers and their employees to insure to the public continuity and efficiency of interstate transportation service . . ." *Union Pacific R. Co. v. Price*, 360 U. S. 601, 609 (1959). The Act contains no section treating the matter of racial discrimination. This is expressly conceded by the Colorado District Court, which sustained the respondent's argument as to preemption (Record, p. 274). The sole basis of that Court's position as to the Railway Labor Act is its erroneous conclusion that the decisions in *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952); and *Conley v. Gibson*, 355 U. S. 412 (1957), have interpreted the Act to prohibit racial discrimination by employers. However, these cases all dealt with discrimination by *labor unions* against employees. This Court held that the duty of the federally sanctioned bargaining representative under the Railway Labor Act includes the duty to represent all employees in the unit fairly without racial discrimination directed against fellow employees. Such decisions have no application to discriminatory hiring practices by an employer where the issue of misuse of federally conferred power is not involved. It should be further noted that the decisions dealt with the right of Negroes *after* they had been hired, and did not concern the right of the individual job *applicant* to be protected against racial discrimination.

⁵ 44 Stat. 577 (1926), as amended, 45 U. S. C. §§ 151-188 (1952).

Thus, there is no provision in the Railway Labor Act concerning racial discrimination by air carriers against job applicants; and, even if the Act could be so interpreted, the states are not precluded from regulating in the same area since there is no evidence of any federal intent to preempt the field and exclude state regulation.

The state District Court further erred in holding that the Civil Aeronautics Act preempted the field of racial discrimination in employment by interstate air carriers. The Court's conclusion resulted from a hasty reading of the word "discrimination" in §§ 402(c) and 484(b) of the Civil Aeronautics Act of 1938,⁹ not supported by any judicial interpretation. Section 402(c) declares, as a policy of the act, "the promotion of adequate, economical, and efficient *service* by air carriers at reasonable charges without unjust discriminations * * *" (emphasis added). Section 484(b) provides that "no air carrier * * * shall * * * subject any particular person * * * *in air transportation* to any unjust discrimination * * *" (emphasis added). For purposes of the act, "air transportation" is defined as "carriage by aircraft of persons or property as a common carrier * * * in commerce * * *" § 401(10), (21).

The purpose of the Civil Aeronautics Act as set forth in its declaration of policy in § 402 (now 49 U.S.C. § 1302) is to regulate air transportation in such manner as most adequately and efficiently promotes foreign and domestic commerce, air safety and national defense. Clearly, the prohibitions against discriminatory conduct contained in the sections to which we have just adverted are limited to discrimination in service against passengers or property. Nowhere do these sections mention or apply to the carrier's employees, job applicants or employment practices. *Fitzgerald v. Pan American World Airways, Inc.*, 229 F. 2d 499 (2d Cir. 1956), cited by the Colorado District Court, held that § 484(b) protected air carrier *passengers*

⁹ 52 Stat. 973 as amended 49 U. S. C. §§ 401-722 (1952). This act was repealed by the Federal Aviation Act of 1958, 49 U. S. C. §§ 1301, *et seq.*, which reenacted the 1938 act with additional provisions.

from racial discrimination, but there is nothing in the opinion which expressly or impliedly extends the section to cover discrimination by air carriers in the hiring of personnel.

A careful reading of the Civil Aeronautics Act leads to the further conclusion that Congress did not by its regulation under the Act intend to occupy the field of regulation of air carriers to the exclusion of the states. See § 676 of the Act (now found in 49 U.S.C. § 1506) entitled "Remedies Not Exclusive". As the Court commented on § 676 in the *Fitzgerald* case, *supra* (229 F. 2d at 502, n. 5):

"The effect of 49 U.S.C.A. § 676 is to avoid the contention that the provisions of the [Civil Aeronautics] Act nullify rights under state laws."

Even if these federal statutes could be interpreted to prohibit racial discrimination in employment by air carriers, similar action by the states to achieve an identical result has not been foreclosed, since Congress has evinced no clear intention to make its regulation exclusive in this area. *Cf. De Veau v. Braisted*, 363 U. S. 144 (1960); *California v. Zook*, 336 U. S. 725 (1949), discussed *ante*, page 12.

It is, we submit, impossible to see how a state anti-discrimination law seeking to remove an arbitrary racial barrier to the hiring of applicants on the basis of skill, merit and experience can in any manner frustrate or interfere with the purposes of these federal statutes, nor is there anything in the statutes themselves nor in the judicial construction of these statutes that supports a theory of Congressional intent to preempt the field of regulation here in issue.

C. The application of the Colorado Anti-Discrimination Act is not preempted by federal executive action.

There is no basis for the Colorado District Court's finding of preemption by reason of federal executive orders requiring the insertion of non-discrimination clauses in

government contracts with private employers. Executive Orders Nos. 10479, 18 Fed. Reg. 4899 (1953), and No. 10557, 19 Fed. Reg. 5655 (1954)⁷ were issued pursuant to the President's control over the operations of the executive department, not as orders regulating commerce, which would have required Congressional authorization. *United States v. Guy W. Capps, Inc.*, 204 F. 2d 655, 659 (4th Cir. 1953), *aff'd on other grounds*, 348 U. S. 296 (1955). In the absence of Congressional authorization, these executive orders cannot establish any Congressional intent of preemption under the commerce clause.

However, even if these executive orders were accorded the status of Acts of Congress, they fail to evidence any intent to limit the operations of state anti-discrimination commissions. Indeed, to hold that preemption has occurred in the instant case would frustrate rather than assist the federal policy set forth in Executive Order No. 10479 "to promote the fullest utilization of all available manpower" and "to promote equal employment opportunity for all qualified persons."

The assistance rendered by state anti-discrimination agencies in promoting equal employment opportunity was itself acknowledged by § 7 of Executive Order No. 10479, which authorized the President's Government Contract Committee "to establish and maintain cooperative relationships with agencies of state and local governments, as well as with non-governmental bodies, to assist in achieving the purposes of this order."

POINT III

The role of the state anti-discrimination agencies is vital and necessary to combat racial discrimination in employment.

The President's Committee on Civil Rights, which, in 1947, advocated federal anti-discrimination legislation,

⁷ These orders which were considered by the Colorado District Court to be applicable to this case were subsequently superseded by Executive Order No. 10925, 26 Fed. Reg. 1977 (1961).

recognized the need for state action in this area by declaring:

"There is much that the states and local communities can do in this field and much that they alone can do . . . The very complexity of the civil rights problem calls for much experimental, remedial action which may be better undertaken by the states than by the national government. Parallel state and local action supporting the national program is highly desirable . . . the enactment of a federal fair employment practice act will not render similar state legislation unnecessary." *To Secure These Rights*, 102 (1947).

Twenty states have undertaken, in the highest traditions of state regulation for the general welfare, to eliminate practices of racial and religious discrimination in employment.⁸ The problem of eliminating racial and religious discrimination from the private sector of our economy is one that eminently lends itself to state initiative. Because of our different regional traditions in intergroup relations, it is inevitable that the pace of community consensus and legal enforcement in this matter will be quicker in certain states than in others. The enduring value of the federal system is that it allows for and encourages such independent development. Appropriately, the states should not be restrained, but should be left free to hasten as best they can in their individual ways the creation of conditions of full equality for all their inhabitants irrespective of race, creed, color or national origin. Moreover, to preclude the states from eliminating the discriminatory hiring practices of any group of employers due to their involvement in interstate commerce

⁸ The extent of the workload of the state anti-discrimination agencies can be seen in the example of the New York State Commission Against Discrimination—now known as the State Commission for Human Rights. In the period 1945-1961, the Commission received 7111 complaints alleging discrimination in employment. In 1961 alone, the Commission handled 1254 employment discrimination complaints, in addition to others dealing with public accommodations and housing. See 1961 SCAD Annual Report, at pages 10, 17 (mimeo., 196.).

serves only to clothe such discriminatory conduct with relative immunity from any governmental interference and to frustrate the effort by the states to meet effectively within their borders the problem of such discrimination, along with its concomitant evils. Such are the social and historical dimensions of the case at bar behind the issue of state versus federal power which is posed by the respondent.

CONCLUSION

The decision of the Court below that the application of the Colorado Anti-Discrimination Act to an interstate air carrier is unconstitutional should be reversed.

Dated: New York, N. Y., January 14, 1963.

Respectfully submitted,

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CALIFORNIA	Ann. Calif. Codes, Labor Code §§ 1410 through 1432 (West, 1962 Cum. Supp.)
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CONNECTICUT	Gen. Stat. Conn., 1958, §§ 31-122 through 31-128 (1962 Rev.)
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MICHIGAN	Mich. Stat. Ann. §§ 17.458(1) through 17.458(11) (1960)
MINNESOTA	Minn. Stat. Ann. §§ 363.01 through 363.13, as amended by L. 1961, ch. 428
MISSOURI	Mo. Ann. Stat. §§ 296.010 through 296.070 (Vernon, 1962 Cum. Supp.)
NEW JERSEY	N. J. Stat. Ann. §§ 18:25-1 through 18:25-28 (West, 1962 Cum. Supp.)
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OCTOBER TERM, 1962

No. 492

MARLON D. GREEN,

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against

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF COLORADO

BRIEF FOR PETITIONER, MARLON D. GREEN

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 492

MARLON D. GREEN,

Petitioner,

against

CONTINENTAL AIR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF COLORADO

**BRIEF ON THE MERITS FOR
MARLON D. GREEN, PETITIONER**

Prologue

Abraham Lincoln, as President of the United States of America, in his Emancipation Proclamation of January 1, 1863, gave freedom to the Negro slaves, recommended "to them that, in all cases when allowed, they labor faithfully for reasonable wages" and invoked "the considerate judgment of mankind and the gracious favor of Almighty God". (U.S. Statutes at Large, Vol. XII, p. 1268-9, Appendix, Proclamation No. 17.)

One hundred years later, the gracious favor of Almighty God and the considerate judgment of this Court are prayerfully invoked so Marlon D. Green, a Negro, will be allowed to labor faithfully for reasonable wages in his chosen occupation of airline pilot and enjoy a full measure of citizenship.

Opinions Below*

The Findings of Fact, Conclusions of Law and Orders of the Colorado Anti-Discrimination Commission are not reported but are set forth in the Printed Record (223, 226). The opinion of the District Court of the City and County of Denver, State of Colorado, reviewing the orders of that Commission, is not reported but is set forth in the Printed Record (257 to 286). The four-to-three decision, dated September 19, 1960, of the Supreme Court of Colorado on the first appeal to that Court is not in the Printed Record. It is reported in 143 Colo. 590, 355 P.2d 83 (1960). This Court granted certiorari on the second four-to-three decision of the Supreme Court of Colorado. It is reported in 386 P.2d 970. The opinions are in the printed record. The majority—Moore, J., p. 288; the dissenting opinion of Frantz, J. and McWilliams, J., p. 296, and of Pringle, J., p. 309. This last decision was rendered on February 13, 1962 and was modified in keeping with the Petition for Rehearing (311). The Petition for Rehearing was then denied on March 5, 1962 (314).

Jurisdiction

On April 30, 1962, petitioner filed his Petition for Writ of Certiorari to the Supreme Court of the State of Colorado. On October 8, 1962, certiorari was granted.

* References will be made to page numbers of the printed Transcript of Record.

The Colorado Anti-Discrimination Commission entered its orders on December 31, 1958 and January 7, 1959 requiring Continental Air Lines, Inc. to cease and desist from its discriminatory and unfair employment practices and to give Marlon D. Green the first opportunity to enroll in its pilot training class with a priority status of June 24, 1957 (223, 226). The judgment of the Denver District Court dismissing Marlon D. Green's complaint before that Commission was entered by the District Court on January 7, 1961 (258-286). The four-to-three decision of the Supreme Court of the State of Colorado, affirming the District Court's judgment dismissing Marlon D. Green's complaint before the Colorado Anti-Discrimination Commission, was rendered on February 13, 1962. Petitions for rehearing were filed, the majority opinion was modified and, as modified, the petition for rehearing was denied on March 5, 1962.

The jurisdiction of the Supreme Court of the United States to grant a writ of certiorari was invoked under 28 United States Code, Section 1257 (3), because the validity of the Colorado Anti-Discrimination Act of 1957 was drawn in question on the ground its application to the hiring practices of employers engaged in interstate commerce was repugnant to the Constitution of the United States.

Questions Presented

The Supreme Court of the State of Colorado has held the Colorado Anti-Discrimination Act of 1957 and the hiring orders entered pursuant thereto by the Colorado Anti-Discrimination Commission, are invalid as to employers engaged in interstate commerce because under the Constitution of the United States only the Congress of the United States has jurisdiction to legislate concerning racial discrimination by employers engaged in interstate commerce. The questions presented are:

1. In the absence of any federal law regulating racial discrimination in employment, is state regulation prohibited by Article I, Section 8, of the United States Constitution?

2. The 1875 Congress of the United States by the unique Enabling Act for the State of Colorado, required that the Constitution of the State of Colorado "shall be republican in form and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Didn't this Congressional commission give the State of Colorado jurisdiction to regulate racial discrimination by employers doing business in the State of Colorado even though engaged in interstate commerce?

3. Whether an employer with its home base and principal office in the State of Colorado that is engaged in interstate commerce can use the silence of the Congress of the United States under Article I, Section 8, of the Constitution of the United States as an iron curtain to protect the employer's discriminatory refusal to hire a qualified Negro as ordered by the Colorado Anti-Discrimination Commission and thus deprive him of liberty, his equal opportunity to employment based on merit and ability, and his civil right to engage in a common occupation of life?

Constitutional Provisions and Statutes Involved

Marlon D. Green filed his complaint under the Colorado Anti-Discrimination Act of 1957 (1960 Supplement—Colorado Revised Statutes 1953, 80-24-1, et seq.) (R. 1). The Congress of the United States, by an act enabling the people of Colorado to form a Constitution, required that

the Constitution "make no distinction in civil or political rights on account of race or color * * *" (18 Stat. 474; 1 Colorado Revised Statutes, 1953, 237 at 238). The provisions of the Constitution of the United States involved are Article I, Section 8 and Article XIV, Section 8.

The pertinent provisions of the Colorado Anti-Discrimination Act of 1957 are: C.R.S. 1953, 80-24-2 (5), which reads:

"'Employer' shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * *"

and C.R.S. 1953, 80-24-6 (1) and (2) which reads:

"Discriminatory and unfair employment practices.—

(1) It shall be a discriminatory or unfair employment practice:

"(2) For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry."

The pertinent provision of the Enabling Act from the Congress of the United States to the people of Colorado is found in Section 4 thereof and reads:

"* * * the said convention shall be and is hereby authorized to form a constitution and state government for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the con-

stitution of the United States and the principles of the declaration of independence; and, provided further, that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; first, that perfect toleration of religious sentiment shall be secured; and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; * * * ”

The pertinent provisions of the Constitution of the United States involved are Article I, Section 8, which reads:

“Powers of congress.—The congress shall have power:
* * *

“(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes. * * *

“(7) To establish postoffices and post roads. * * * ”

And Article XIV, Section 1, which reads:

“* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Statement of the Case*

Marlon D. Green, a United States Air Force pilot officer with the rank of Captain, was honorably discharged in April, 1957 after a tour of duty in Japan. He was then

* Reference to the record will be made by the record page number, but without the prefix “R” or “tr.”

only 27 years of age (167). He was a qualified and federally licensed airplane pilot (33-34). He applied for employment as a pilot with the respondent, Continental Air Lines, Inc., herein called Continental (34-35).

The Continental, application forms given Stearns, a United States Navy pilot, and Green, required a photo, race, and descent (Rspt. Suppl. Exs.: 192, 203, 215). Continental's pilot qualifications included: "Age: Not * * * over 30 years—Flight Time: Minimum 2,000 hours" (155, 189).

Green's application was placed on file at the headquarters office at Denver (192, 215). In June, 1957, Continental started to recruit 14 or 15 pilots. Continental invited Green to come to its headquarters offices in Denver for an employment interview (37, 175), not knowing he was a Negro (113-114, 121, 147). When he arrived in Denver, Green was 28 years of age. He took and passed a link trainer and flight test given by Continental (R. 39, 41-46). Fourteen pilots were interviewed for the July class (R. 103). Six, including Green, were found qualified. The flight experience of these qualified six applicants is shown by the following table:*

	<i>Total Hours</i>	<i>First Pilot</i>	<i>Co- Pilot</i>	<i>Multi- Engine</i>	
Green	3071:30	1838:15	778:45	2900:00	(26-32, 92, 215)
George	2100:53	1145:35	874:13	897:23	(199, 220)
Stearns	1200:00	750:00	450:00	934:00	(203, 220)
Bryant	1160:00	1160:00	—	5:00**	(213, 221)
Dresser	1031:00	916:00	—	—	(207, 221)
Cole	1000:00	900:00	100:00	200:00	(195, 222)

* This table is constructed from Green's testimony and the supplementary exhibits requested by the Commission and offered by Continental for the six pilot applicants (R. 192-222).

** Acquired between June 25, 1957, when Green and Bryant were examined, and July 1, 1957.

Continental's exhibit on flight time qualifications showed that all pilots were required to have "Minimum: 2,000 hours (Flight time must be substantiated by certified log or record)" (Respt. Ex. 2; R. 105, 158, 155, 156; 189). Neither Stearns, Bryant, Dresser nor Cole met Continental's minimum flight time requirements (R. 156). Four of the five found qualified with Green were ordered into Continental's July, 1957 training program, and the fifth started in September, 1957 (R. 102, 120, 127). In the August, 1957 class, there were ten additional pilots, in the September, 1957 class, six, and three in the November, 1957 class (R. 102). Continental's Vice President, Personnel, agreed that Green was a qualified pilot (R. 103, 114). Green was never selected for a training class. He was never told he was no longer considered (R. 130), but all other applicants were (R. 103, f. 328, R. 124, f. 360).

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission (R. 1). Continental, in its answer before the Commission, claimed the Commission lacked jurisdiction because the Colorado Anti-Discrimination Act as applied to Continental constituted an undue burden on interstate commerce, and because of federal pre-emption (R. 4-7). It did not plead any statutes of any other state. It claimed the Act's ban against photos on applications denied it the equal protection of the laws and deprived it of property without due process of law contrary to Section 1 of the Fourteenth Amendment.

Hearing was held before the Commission on May 7 and 8, 1958 (R. 7-223). Continental's evidence established that its headquarters offices, hangars, Treasury, and Personnel Offices, were at Denver, Colorado (R. 98, 99); that at Denver it had 800 employees (R. 109); that Continental was an airline certified by the C.A.B., to provide air transportation for persons and property and operated in eight states

(R. 108-109); and that only at Denver were flight crew personnel (pilot, flight engineer, and hostess) applicants screened, tested, interviewed, and hired or not hired (R. 97, 98, 99, 103, 106, and 153). In 1957, 178 pilot applicants were brought to Denver for interview (R. 102). About its operation in eight states, it had only a sales office at San Francisco, California (R. 107), and bases at Dallas and El Paso, Texas (R. 109). No evidence was offered on Continental's activity in New Mexico, Oklahoma, Kansas, Missouri and Illinois, whether or not it was only fly-over or sales offices. Continental offered no evidence to show that (a) it was engaged in commerce *between* two or more of the eight states; (b) its operation was in fact interstate; (c) it was treated differently from other employers whether interstate or not, or certified or not by the C.A.B.; (d) the presence or absence of any fair employment practice act similar to or different from the Colorado Anti-Discrimination Act in any of the seven other states, or (e) compliance with the Colorado Anti-Discrimination Act would subject it to any burden, expense, inefficiency, delay, change of pilots in flight, or confusion in interstate operations, or restriction on its right of free passage.

Under its collective bargaining contract with the American Pilots Association, Continental had the right to hire whomever it pleased on a one-year probationary basis. During the one-year probationary period, it had the right to discharge without question (R. 125, 129).

The record did not evidence that Continental was engaged in interstate commerce among the states, nor that the position Green applied for actually involved interstate operations until a court-approved stipulation so agreeing was entered into before the Denver District Court (R. 256), more than 22 months after the order and decision of the Colorado Anti-Discrimination Commission (R. 223 to 227).

On December 19, 1958, the Commission ordered Continental (a) to cease and desist from its discriminatory and unfair employment practices, including its use of an application form asking for "race" and a photograph, and (b) to give Green the first opportunity to enroll in its training school with a priority status as of June 24, 1957 (223). The Commission found that Green was denied employment because of his race, although he was "better qualified for the position of co-pilot than any applicant interviewed" (225).

Continental petitioned the District Court for the City and County of Denver to review the Commission's decision and order, claiming federal pre-emption, and undue burden on interstate commerce (227-229). The Commission answered and petitioned for a Court order enforcing the Commission's order (238).

Green's answer asked the Court, with deliberate speed, to enter a decree enforcing the Commission's order and pleaded the absence of evidence that: (a) the prohibition against discrimination in hiring on account of race or color constituted a burden on interstate commerce, and (b) any law or regulation of the United States or any of its agencies prohibited racial discrimination against prospective employees of interstate commercial air carriers. Green also invoked the requirement of the Congressional Enabling Act for the State of Colorado that the State would "make no distinction in civil or political rights on account of race or color" (246-247).

The District Court for the City and County of Denver remanded the case to the Commission to make findings of fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the Anti-Discrimination Act, and whether the employment for which

Green had applied actually involved interstate commerce. The Commission thereupon made a new decision and purported to vacate its original one, and the District Court then held that the Commission's new action had rendered the complaint moot. Upon review to the Colorado Supreme Court by writ of error, the Colorado Supreme Court held that the Commission was powerless to withdraw its original decision, and that its second decision was void. The District Court was ordered to rule on the first decision of the Commission. (*Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83 (1960).)

The Colorado Anti-Discrimination Commission and Marlon D. Green stipulated with Continental Air Lines, Inc., with District Court approval, that Continental was engaged in interstate commerce among the eight states in which it conducted its business, that the Commission would find Continental was subject to the Anti-Discrimination Act if the record were remanded to it, and that the position Green had applied for involved interstate operations (R. 256).

On January 7, 1961, the District Court for the City and County of Denver held that the Colorado Anti-Discrimination Act could not be constitutionally extended to cover the flight crew personnel of an interstate air carrier. It also held that the Railway Labor Act, the Civil Aeronautics Act, and federal Executive Orders pre-empted the regulation of racial discrimination as applied to interstate air carriers.

The District Court ordered that "a motion for a new trial be dispensed with, and if filed, would be overruled" (R. 286). Thus, no opportunity was given to Green to challenge this state-court order on the ground it denied Green equal protection of the laws under the Fourteenth Amendment.

Writ of error was then taken to the Supreme Court of the State of Colorado which, by a four-to-three decision, affirmed the judgment of the trial court on the express ground that the Colorado Anti-Discrimination Act could not be constitutionally applied to the hiring of flight crew personnel of an interstate air carrier as this would put an undue burden on interstate commerce. The majority opinion said "The findings, conclusions, and judgment of the trial court might well be adopted in toto as the opinion of this Court" (293). The controlling principle applied by the majority was "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (294). (*Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, — Colo. —, 368 P.2d 970 (1962).)

On April 30, 1962, Green filed Petition for Writ of Certiorari to the Supreme Court of the State of Colorado, and it was granted on October 8, 1962.

On April 30, 1957, Green's application for work was received at Continental's headquarters at Denver (R. 215).

Summary of Argument

The judgment of the Colorado Supreme Court should be reversed because:

I

Congress enacted no federal law prohibiting racial, creedal, and ancestral discrimination by a private employer engaged in interstate commerce.

II

Pursuant to the power vested in Congress by Section 5 of the Fourteenth Amendment, the Congress, in 1875, enacted into the Enabling Act to the people of Colorado a "Civil Rights Bill" requiring: (a) that the State constitution shall make "no distinction in civil or political rights on account of race or color", and (b) that an ordinance irrevocable provide that "perfect toleration of religious sentiment be secured". The Congressional requirement and delegation of legislative authority remained in force after Colorado's admission (*U.S. v. Sandoval*, 231 U.S. 28 (1914)). To Colorado, Congress delegated a deposit of legislative authority over civil rights to pass (a) prohibitory legislation providing judicial and administrative machinery to ban discrimination in public employment as required by the Fourteenth Amendment and (b) implementing legislation extending the policy of the Fourteenth Amendment to ban discrimination in private employment. Such a delegation by Congress to enact general civil rights legislation was approved in *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1952). To fulfill the purpose of this appropriate Congressional legislative requirement and delegation, the State of Colorado enacted the Colorado Anti-Discrimination Act of 1957 to abolish private employment discrimination "on account of race or color or religion or national origin".

III

Even if Congress had not given express authority to Colorado to prohibit racial, creedal and ancestral discrimination in private employment, Colorado as a state, had the right and obligation under its police power to protect the public interest and safety of citizens of the United States. The *Civil Rights Cases*, 109 U.S. 3 (1883), held that discriminatory acts by individuals were "within

the domain of the state legislature". Under her police power, Colorado enacted the Colorado Anti-Discrimination Act to prohibit discrimination in private employment, areas where neither the Fifth nor the Fourteenth Amendments of the United States Constitution has reached. The Colorado Act goes one step further than the Fourteenth Amendment, and extends Fourteenth Amendment anti-discrimination policies to private employers doing business in Colorado. The Colorado Act extends to all citizens of the United States employed in Colorado by private employers hiring in Colorado the enjoyment of equality of civil rights to engage in the common occupations of life. Such state legislation against discrimination was upheld in *Railway Mail Assn. v. Corsi*, 326 U.S. 88 (1945), and in the District of Columbia in *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1952). Continental has invoked the wrong constitutional clause, that is, the commerce clause, where its objection to state law should have been the due process clause (*Braniff Airways v. Nebraska State Board*, 347 U.S. 590 at 598-599 (1959)). Thus, the *Corsi* case has additional force.

IV

Continental's headquarters, all its employment activity and its racial discrimination against Green were concentrated and localized at Denver, Colorado. The record is devoid of any evidence of any hiring activity outside of Colorado. It is also devoid of any diverse law of any other state. Thus, the facts require the reversal of the erroneous conclusion of the Colorado Supreme Court based on its misapplication of the national uniformity test found in *Hall v. DeCuir*, 95 U.S. 485 (1878); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); and *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960). The latter two cases and the principle of the two former cases clearly require reversal.

V

The Colorado Anti-Discrimination Act prohibiting racial, creedal and ancestral discrimination in private employment in no way burdens interstate commerce. It supplements established national policy and facilitates, rather than impedes, the free flow of interstate commerce.

VI

Even if compliance with the Colorado Anti-Discrimination Act was an inconvenience to an interstate employer of flight crew personnel, it was a much smaller burden than the Nebraska tax on eighteen stops a day sustained in *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 at 598-599 (1954).

VII

The Colorado Anti-Discrimination Act, as applied to Continental, did not conflict with any federal act such as the Civil Aeronautics Act or the Railway Labor Act.

ARGUMENT

I

Congress Enacted No Federal Law Prohibiting Racial, Creedal and Ancestral Discrimination by a Private Employer Engaged in Interstate Commerce.

Congress has enacted no federal law prohibiting racial, creedal and ancestral discrimination by a private employer engaged in interstate commerce. In 1944, Senators Wagner, Murray and others first introduced to the 78th Congress a bill to prohibit discrimination in employment because of race, color, creed, religion or national origin (S. 2048, 78th Congress; S. Rept. No. 1109, 78th Cong.; Sept. 20, 1944,

Cong. Record, Vol. 90, p. 7973). In the Senate and the House of Representatives, a number of similar bills have been introduced, in each session down to and including the 87th Congress. The bills in the 87th Congress, 1st Session (1961), were for federal fair employment practices and federal equality of opportunity in employment (S. 1819, 87th Cong., 1st Sess. (1961) (federal fair employment practices); S. 1258, 87th Cong., 1st Sess. (1961) (federal equality of opportunity in employment)). All of these bills defined employer as a person engaged in interstate commerce. Not one of these bills has been passed. In the absence of a Federal F.E.P.C. law, a state has the authority to subject to its anti-discrimination law employers who are engaged in interstate commerce (*Williams v. Int'l Brotherhood*, 27 Cal. 2d 685, 165 P.2d 903).

II

Congress, by Section 5 of the Fourteenth Amendment, Enacted a Civil Rights Bill Into the Colorado Enabling Act and Deposited With Colorado, Legislative Authority Over Civil Rights Legislation Banning Racial and Creedal Discrimination in Private Employment.

Congress, by Section 5 of the Fourteenth Amendment, enacted a Civil Rights Bill into the Colorado Enabling Act and deposited with Colorado, legislative authority over civil rights legislation banning racial and creedal discrimination in private employment.

The pertinent provision of the Enabling Act from the Congress of the United States to the people of Colorado is found in Section 4 thereof and reads:

" * * * ~~the~~ said convention shall be and is hereby authorized to form a constitution and state government

for said territory; provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence; and, provided further, that said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; first, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; * * * .

The Congress of the United States, pursuant to Section 3, Article IV of the Constitution of the United States, admitted the Territory of Colorado to the Union. The Enabling Act was passed by the Congress after the Thirteenth, Fourteenth and Fifteenth Amendments had been adopted. (Thirteenth Amendment, December 18, 1865; Fourteenth Amendment, July 28, 1866; and Fifteenth Amendment, March 30, 1870.) Each of these Civil War Amendments by separate sections thereof stated in substance, as Section 5 of the Fourteenth Amendment reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The legislative history shows that such sections are "a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." (*Cong. Globe*, 39th Congress, 1st Sess. p. 2766.) Senator Howard further said: "I look upon this clause (Section 5 of the Fourteenth Amendment) as indispensable for the reason that it thus casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the Amendment are carried out in good faith, and that no State infringes

the rights of persons or property. I look upon this clause as indispensable for the reason that it thus imposes upon Congress this power and duty."

Two enabling acts for the State of Colorado were vetoed on racial grounds. On May 16, 1866, President Andrew Johnson vetoed the first enabling act for the admission of the State of Colorado into the Union. (39th Congress, 1st Sess.—Senate—Executive Document No. 45.) The second enabling act passed by Congress was also vetoed by Andrew Johnson. His veto message to Congress of January 28, 1867 states as its first ground for veto that the laws of the then territory absolutely prohibited negroes and mulattoes from voting and excluded them from the right to sit as jurors. (39th Congress, 2nd Sess.—Senate—Executive Document No. 7.) The first congressional act for a temporary government for the territory of Colorado (Senate Bill No. 366) ran into heavy Senate debate because under the Bill, the decision of the territorial courts on questions affecting property rights in slaves would have been final and conclusive and there would have been no appeal to the United States Supreme Court. (*The Cong. Globe*, February 26, 1861, pages 1205-1206.)

The Enabling Act for the admission of the State of Colorado to the Union was finally passed in 1875. The congressional debate of February 24, 1875 shows that Senator Hamilton of Maryland moved to strike the requirement that the state constitution should make "no distinction in civil or political rights on account of ~~race or color~~, except Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." He objected that the new state should "have a civil rights bill put in their organic law." (Vol. 3, part 3 and appendix, 43rd Cong., 2nd Sess., pages 1671 to 1690 at 1683.) Objection was made even to incorporating

into the Colorado Constitution the principles of the Declaration of Independence. Senator Merrimon of North Carolina limited the motion to strike to the phrase, "and make no distinction in civil or political rights on account of race or color, except Indians not taxed" (*idem* page 1685).

Senator Sargent, in the debate, made clear not only that this racial proviso was unique but also that the Enabling Act requirement was a reflection of the right of Congress to pass appropriate legislation. Senator Sargent's words were "The Senator from Maryland says that this provision requiring that the new State's constitution shall make no distinction in civil or political rights on account of race or color is now for the first time raised in reference to any new State. This is very true. The Fourteenth Amendment was finally ratified in 1868, four years after the law passed for the admission of Nebraska. There was no provision in the Constitution of the United States at that time guaranteeing these equal civil and political rights, and consequently Congress had no right to require that a new State coming into the Union should provide against discriminations in this manner. After that act was passed, in 1868 the Fourteenth Amendment was ratified, and consequently Congress now has a right, and it is its duty, to insist that a constitution shall be thoroughly republican in form; that is to say, it shall see that there are none of these discriminations which shall 'deprive any person of life, liberty, or property without due process of law,' or 'deny to any person within its jurisdiction the equal protection of the laws.'

"That is the reason why on account of an enlargement of the horizon, because the Constitution is more effective than it was in those days upon these very matters, because Congress and the people and the requisite number of States by their solemn judgment have determined that these discriminations shall not exist, now more than ten years after

1864 and six years after the adoption of this Fourteenth Amendment to the Constitution of the United States, it is brought forward" (*idem* 1685-6). In arguing that the unique provision of the Enabling Act should be stricken, Senator Merrimon pointed out that each State should have equal dignity and that several states had the power in the exercise of their police powers to make wide and important distinctions in the enjoyment of civil rights. For example, the Southern States had the power in the exercise of their police power to provide that the African race "shall be educated in one class of schools, while the white race shall be educated in another class of schools" (*idem* 1688). When the vote was taken on the motion to strike, it was rejected by 39 to 18 (*idem* 1689).

The Congressional debate indicates, at least in the opinion of some, that the Fourteenth Amendment was passed to prevent "a state from passing a law that no colored citizen shall be admitted to practice law or be allowed to preach the gospel or to teach in the schools or to embark in any other honorable vocation or pursuit of life". (Senator Carpenter of Wisconsin, Cong. Record, 42nd Congress, 2nd Sess., p. 244.)

The Colorado Constitution, as adopted, pursuant to the appropriate congressional legislation giving effect to the national policies reflected in the Fourteenth Amendment, was designed to secure to all persons the perfect equality of civil rights. (Colorado Constitution, Art. II, Sec. 3—Inalienable Rights, Sec. 4—Religious Freedom, Sec. 6—Equality of Justice, Sec. 11—*Ex post facto* Laws and Privileges and Immunities; Art. VII, Sec. 1—Universal Suffrage; and Art. IX, Sec. 8—Banning of religious Test and Racial Discrimination in Public Education.)

The Colorado Constitution expressly incorporates the principles of the Declaration of Independence into its Bill

of Rights (Art. II, Sec. 3). Not only did the Colorado Bill of Rights prohibit slavery (Art. II, Sec. 27), but also gave to persons of foreign origin who resided in the State the right to acquire and dispose of property as native born citizens, and thereby removed the aliens' disability to hold property.

The Colorado Constitution, in keeping with the enabling act of the Congress of the United States, prohibited "any distinction or classification of pupils * * * on account of race or color" in any public educational institution of the State (Art. IX, Sec. 8). This forbade the segregated education of the races as claimed by Senator Merrimon and reflected the national policies declared in 1954 in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Article VI, Section 3 of the Federal Constitution declares no religious test shall ever be required as a qualification to any office or public trust under the United States.

The Colorado Bill of Rights, Article II, Section 4, expressly prohibits discrimination and denial of any political right, privilege, or capacity on account of a person's opinions concerning religion. (See *Torcaso v. Watkins*, 367 U.S. 488 (1961).)

The Congressional requirements and delegation of legislative authority remained in force after Colorado's admission to the Union (*U.S. v. Sandoval*, 231 U.S. 28 (1914)). In fulfillment of the requirements and the delegation by Congress of legislative authority over civil rights, Colorado was empowered to pass: (a) prohibitory legislation providing judicial and administrative machinery to ban discrimination in public employment as required by the Fourteenth Amendment, and (b) implementing legislation extending the policy of the Fourteenth Amendment to ban discrimination in private employment. To fulfill the pur-

poses of the Fourteenth Amendment, and acting under the legislative authority delegated to it by Congress, the State of Colorado, in 1895, passed a Civil Rights Act requiring equal public accommodations by private business (C.R.S. 1953, 25-1-1 to 5). In 1917, it prohibited discriminatory advertising, in 1953, it first prohibited discrimination in employment, and in 1957, passed the Colorado Anti-Discrimination Act here involved. In 1959, it passed the Colorado Fair Housing Act.

The Anti-Discrimination Act of 1957 bars discrimination based on race, creed, color, national origin, or ancestry by employers against employees or applicants for employment. Its prohibition is directed against discrimination practices carried on by employers within the State of Colorado. It provides the administrative and judicial machinery to redress discrimination in state public employment as an implementation to the Fourteenth Amendment, and it goes one step further than the Fourteenth Amendment by providing the machinery for redress against discrimination in private employment.

III

Colorado, Under Her Police Power, Passed the Colorado Anti-Discrimination Act of 1957 to Extend the Equal Protection and Anti-Discrimination Policies of the Fourteenth Amendment to Private Employers Engaged in Business in Colorado.

By enacting the Anti-Discrimination Act as an exercise of local police power, Colorado also furthered vital and paramount state interests. The *Civil Rights Cases*, 109 U.S. 3 (1883), held that discriminatory acts by individuals were "within the domain of the state legislature." Congress required Colorado to have a constitution and laws not "repugnant to the Constitution of the United States". The

Colorado Anti-Discrimination Act parallels and fulfills the Fourteenth Amendment equal protection prohibition against discrimination in public employment on the basis of race, religion or color, and provides enforcement machinery. (*Schwabe v. Board of Bar Examiners*, 353 U.S. 232 at 238 (1957); see *Torcaso v. Watkins*, 367 U.S. 488 (1961).) Congress has not spoken and not passed "appropriate legislation" banning racial, creedal and ancestral discrimination by private employers engaged in interstate commerce. From the silence of Congress is also found its presumed intention that banning such discrimination does not need national uniformity and is subject to local regulation. (Cf. *Cities Service G. Co. v. Peerless O. & G. Co.*, 340 U.S. 179 at 186-7 (1950).)

The right to follow any of the ordinary callings of life is a civil right. The area devoid of "appropriate legislation" to ensure this civil right and in which prejudice and discrimination operated was private employment "within the domain of the state legislature". The absence of "appropriate legislation" by Congress applicable to private employers engaged in interstate commerce invited the State of Colorado to pass effectuating legislation equally applicable to interstate and intrastate private employers. An anti-discrimination act of less scope restricted to intrastate private employers would have permitted a dominant number of private employers doing business in Colorado to discriminate in employment on account of race or color or religion or national origin.

Additional reasons for banning discrimination in private employment were Colorado's interest in keeping the peace, utilizing all human resources, preventing unemployment, promoting the state's economy, increasing taxable earnings, and stimulating the sources of investment capital for state development and advancement. (a) The practice of deny-

ing employment opportunity and discriminating in the terms of employment on account of race, color, or religion generates civil strife and disturbances. (b) Discrimination wastes resources in manpower not only of the unskilled and semi-skilled, but also of the skilled. (Buckley, *Discriminatory Aspects of the Labor Market of the 60's*, 19 Review of Social Economy 25 (Mar. 1961); Moorow, *American Negroes—A Wasted Resource*, 35 Harvard Business Review 65 (Jan.-Feb., 1957).) (c) Discrimination stimulates unemployment in the state, with proportionate increases of welfare and relief applicants. It depresses the earnings and purchasing power of all employable persons in the state. (Simpson-Yinger, *Racial and Cultural Minorities*, Rev. ed. (1958), p. 273.) (d) Laws banning prejudice and discrimination in private employment promote the state's economy and also stimulate the free flow of commerce between the states. Where prejudice and discrimination in employment depress purchasing power and the state income and sales taxes, laws banning such prejudice and discrimination increase the taxable earnings and purchases (Simpson-Yinger, *supra*, p. 273). Prejudice and discrimination in employment reduce the potential wealth of the state and the capital of employable persons so such wealth and capital are not available for investment in state development and advancement.

It is a paramount concern to Colorado that the qualified applicant obtain a job demanding his highest skills so he is not a soft target for subversive Communist penetration.* Prejudice and discrimination in employment break the soil for undermining the foundations of a free democratic state.

* *The Denver Post*, Jan. 24, 1961, p. 14, col. 1, Castro's Communist Cuba offered Marlon D. Green employment as a pilot.

In *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 at 41 (1948), in his concurring opinion, Mr. Justice Douglas stated that: "the police power of a State under our constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color". He cites as authority for this the United States Supreme Court decision in the case of *Railway Mail Association v. Corsi*, 326 U.S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072 (1944). This decision turned upon the constitutionality of the New York Civil Rights law, in particular of Section 43 prohibiting racial or religious discrimination by unions against their members. The union involved in that case was the union of Postal Clerks of the United States Railway mail service. The argument made by the union was that the State of New York, by subjecting the union of Postal Clerks to its anti-discrimination law, violated Article I, Section 8, Clause 7 of the United States Constitution, which established the Federal postal power. In dismissing this argument, the opinion for a unanimous court stated as follows:

"Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless. *Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749, 86 L. Ed. 1154, 1164, 62 S. Ct. 820, and cases cited. There is no such clear manifestation of Congressional intent to exclude in this case. Nor are we called upon to consider whether Congress, in the exercise of its power over the post offices and post roads, could regulate the appellant organization. Suffice it to say, that we do not find it to have exercised such power so far and thus regulation by the states is not precluded" (326 U.S. at 97).

Mr. Justice Frankfurter, in a concurring opinion, stated:

" . . . it is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a State may leave abstention from such discriminations to the conscience of individuals. On the other hand, a State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a State to extend the area of non-discrimination beyond that which the Constitution itself exacts" (326 U.S. at 98).

The right of local government to pass anti-discrimination legislation was reaffirmed by this Court in *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1952), where it was stated, at 109:

" . . . And certainly so far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states. See *Railway Mail Asso. v. Corsi*, 326 U.S. 88, 93, 94."

Neither Continental nor the District Court, in its decision, nor the Colorado Supreme Court, has questioned the authority of the State of Colorado to enact legislation banning racial, creedal, and ancestral discrimination. Each of them has invoked the wrong constitutional clause, that is the commerce clause, where in fact, Continental should have cast its objection to the state law in the words of the due process clause of the Fourteenth Amendment. A similar mistake was made in *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 at 598-599 (1959). When the objection of Continental is considered in its correct aspect, the *Corsi* case has additional force.

IV

Continental's Headquarters, All Its Employment Activity and Its Racial Discrimination Against Green Were Concentrated at Denver, Colorado. There Is No Evidence of Any Hiring Activity Outside Colorado or of Any Diverse Law of Any Other State. There Is No Evidence of Any Burden or Conflict.

Continental's evidence established that its headquarters offices, hangars, Treasury, and Personnel Offices were at Denver, Colorado, where it had 800 employees (R. 98, 99, 109). At Denver, all flight crew personnel (pilot, flight engineer, and hostess) applicants were screened, tested, interviewed and hired or not hired (R. 97, 98, 99, 103, 106 and 153). About its operation in eight states, it had only a sales office at San Francisco, California (R. 107), and bases at Dallas and El Paso, Texas (R. 109). No evidence was offered on Continental's activity in New Mexico, Oklahoma, Kansas, Missouri and Illinois, whether or not it was only fly-over or sales offices. Continental offered no evidence to show that (a) it was engaged in commerce between two or more of the eight states; (b) its operation

was in fact interstate; (c) it was treated differently from other employers whether interstate or not, or certified or not by the C.A.B.; (d) the presence or absence of any fair employment practice act similar to or different from the Colorado Anti-Discrimination Act in any of the seven other states, or (e) compliance with the Colorado Anti-Discrimination Act would subject it to any burden, expense, inefficiency, delay, change of pilots in flight, or confusion in interstate operations, or restriction on its right of free passage.

The Colorado Anti-Discrimination Commission was not asked to and did not, on its own motion, take notice of the law of any other state. The Colorado Anti-Discrimination Commission could not have taken judicial notice of general, technical, or scientific facts within its knowledge unless it complied with the Colorado Administrative Procedure Act (Colo. Rev. Stat. 1960 Suppl., 3-16-1 to 6). This Act requires the fact so noticed must be specified in the record or brought to the attention of the parties before final decision, and every party is afforded an opportunity to controvert the fact so noticed (*idem* 3-116-4 (8)).

The record did not evidence that Continental was engaged in interstate commerce among the states, nor that the position Green applied for actually involved interstate operations until a court approved stipulation so agreeing was entered into before the Denver District Court (R. 256), more than 22 months after the order and decision of the Colorado Anti-Discrimination Commission (R. 223 to 227).

Further, at no time had Continental pleaded or introduced in evidence any law of any of the other seven states as required by the settled law of Colorado (*Pando v. Jasper*, 133 Colo. 321 at 324, 295 P.2d 229 at 230 (1956)); and the settled law of this Court (*Hanley v. Donoghue*, 116 U.S. 1 at 6, 29 L.Ed. 537 (1885)).

The only evidence in the record of any law banning employment discrimination is the evidence of the Colorado Anti-Discrimination Act of 1957. The record has no evidence of the presence or absence of any fair employment practice legislation similar to or different from the Colorado Anti-Discrimination Act in any of the seven other states: California, New Mexico, Oklahoma, Texas, Kansas, Missouri and Illinois.

Judicial notice cannot be taken of the laws of another state. When the revisory power of this Court has granted certiorari to determine whether a question of law depending upon the Constitution or laws of the United States has been erroneously decided by the State Court upon the facts before it, the laws of another state or states are fact, which must be proved to be considered. This Court does not take judicial notice of them unless the laws are in evidence and made part of the record. Where the highest Court of the state does not take judicial notice of the laws of other states, those laws, like other facts, must be proved and in the record before they can be considered (*Hanley v. Donoghue*, 116 U.S. 1 at 6 (1885), Cf. *Hartford L. I. Co. v. Johnson*, 249 U.S. 490 (1919)). It is the well settled law of Colorado that a party who wishes to rely upon the statutes of another state to support his position in a legal controversy must plead and prove such statutes like other facts (*Polk v. Butterfield*, 9 Colo. 325, 12 P. 216 (1886); *Pando v. Jasper*, 133 Colo. 321 at 324, 295 P.2d 229 at 230 (1956)).

In short, the facts show there was no burden on interstate commerce. Since only Colorado law appears in the record, the facts show no conflict with any diverse state law. The record gives no evidence of a checkerboard (*Hall v. DeCuir*, *infra*), nor a crazy quilt (*Morgan v. Virginia*, *infra*) of state laws affecting Continental's interstate operation.

When Congress has been silent, Article I, Section 8 of the United States Constitution excludes state legislation when a checkerboard or crazy quilt of state laws discriminates against or embarrasses interstate commerce and the facts demand national uniformity to protect the free flow of that commerce.

The Colorado Supreme Court erroneously, but without citing any, or taking judicial notice of any, must have assumed some undisclosed diverse law of some other state or states that would have produced a checkerboard or crazy quilt of state regulations requiring national uniformity.

It concluded on the basis of *Hall v. DeCuir* and *Morgan v. Virginia* (R. 294, f. 646):

"Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States."

Green does not waive any rights or expect that this Court will take judicial notice of the laws of any of the other seven states but if this court did take such judicial notice, reason and principle establish the error of the Colorado Supreme Court.

The equal protection clause of the Fourteenth Amendment makes legally impossible a checkerboard or crazy quilt of conflicting state regulation in the field of employment because no state can constitutionally enact a policy of discrimination in employment (Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420 (1948); *Truax v. Riech*, 239 U.S. 33 (1915)). To illustrate, if the State of Colorado has an anti-discrimination

policy which it applies to flight crew personnel, and the State of Lillywhite has no policy and neither favors nor bans discrimination, there is no risk of interrupting the flow of commerce in the State of Lillywhite or anywhere else. The equal protection clause of the Fourteenth Amendment will strike down any attempt by the State of Lillywhite to enforce a law applicable to flight crew personnel requiring them to be white, gentile, and Anglo.

The factual assumptions of the Colorado Supreme Court do not exist in the record and under the new constitutional doctrine of *Brown v. Board of Education*, these factual assumptions could not in the future affect interstate employees (*Boydton v. Virginia*, 364 U.S. 454 (1960)). The Colorado Supreme Court based its decision on the traditional test: whether, in the absence of Congressional action, a state law must yield to a need for national uniformity (R. 294, 296). There is no quarrel with the test where the requirements of national uniformity are supported by the facts, but the requirement of non-prejudiced and non-discriminatory hiring is not the type of regulation which is of such a nature as to require exclusive legislation by Congress (*Cooley v. Board of Wardens*, 12 How. 299, 319).

The national uniformity test has been applied in many cases where a checkerboard or crazy quilt of state regulatory sources would embarrass, impede and burden the free flow of interstate commerce. Such cases include *Morgan v. Virginia*, 328 U.S. 373 (1946) and *Hall v. DeCuir*, 95 U.S. 485 (1878). The facts in the former presented a crazy quilt pattern and in the latter, a checkerboard pattern of differing state laws directly burdening interstate carriers, and disturbing interstate passengers with stops at state boundaries for passenger rearrangement to meet the conflicting policies of the differing state laws. This court accordingly found a need for national uniformity in passenger regulations, and said:

"On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a State line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be." (95 U.S. 485 at 489.)

The facts in *Morgan v. Virginia* (*supra*) showed a crazy quilt of differing and conflicting state laws. Eighteen states prohibited racial separation on public carriers, ten required separation on motor carriers. Exceptions in some state laws were made for interstate passengers with through tickets. In some states, the laws differed in their definition of the amount of Negro blood that made a person colored. From these facts, this Court found the need for national conformity.

The Colorado Supreme Court has misread these cases to mean: "Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (R. 294). The mistake of the Colorado Supreme Court is twofold. In the Green case, only the Colorado Anti-Discrimination Act is in evidence. There is no checkerboard or crazy quilt of diverse and conflicting laws. *Hall* and *Morgan* do not establish that

state racial regulations, as such, are an unreasonable burden on interstate commerce. In principle and reason, the regulation of racial and religious prejudice and discrimination does not demand exclusive regulation by a single authority.

An appeal to *Hall* and *Morgan* does not support the paradoxical result reached by the Colorado Supreme Court. The principle of national uniformity established in these two cases was recently applied in *Huron Cement Co. v. Detroit*, 362 U.S. 440 (1960), when this Court refused to invalidate a Detroit smog ordinance applied to seagoing interstate ships as an undue burden on interstate commerce. There, as in the *Green* case, the facts failed to show any "competing or conflicting local regulations". (362 U.S. at 448.)

Racial discrimination by an interstate carrier is a proper subject for state action. A leading decision of this Court supporting the power of the State of Colorado, exercised in the Colorado Anti-Discrimination Act, is *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948). This case accepts the traditional test of *Morgan* and *Hall*. A steamship company operating boats between Detroit and an island in Canada barred admission to one of its boats to a person of the Negro race, thereby violating the Michigan statute prohibiting discrimination in places of public accommodation. The trial court found the company guilty of violating that statute and imposed a fine. The Michigan Supreme Court affirmed. The defendant appealed to the U. S. Supreme Court on the ground that Michigan had no power under the Federal Constitution to use its civil rights statute against a company engaged in foreign commerce, because by doing so the state interfered with such foreign commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution. The United States Supreme

Court dismissed the appeal. In response to the claim that *Hall* and *Morgan* were controlling, this court ruled:

"We need only say that no one of those decisions is comparable in its facts * * *

"It is difficult to imagine what national interest or policy, whether of *securing uniformity in regulating commerce*, affecting relations with foreign nations or otherwise, could reasonably be found to be adversely affected by applying Michigan's statute to these facts or to outweigh her interest in doing so. Certainly there is no national interest which overrides the interest of Michigan to forbid this type of discrimination practiced here. And, in view of these facts, the ruling would be strange indeed, to come from this Court, that Michigan could not apply her long-settled policy against racial and creedal discrimination to this segment of foreign commerce, so peculiarly and almost exclusively affecting her people and institutions." (Emphasis added.) (333 U.S. at 40.)

Although the *Bob-Lo* case deals with the regulation of "foreign" commerce, the rationale of the decision applies equally to interstate commerce. (333 U.S. at 38.)

In short, the facts in the *Green* case establish a concentration of Continental's principal business activities and all hiring and discrimination in hiring at Denver, Colorado. By stipulation, it was finally established that Continental was engaged in interstate commerce. Nevertheless, there is no evidence of any burden on interstate commerce. There is evidence only of the law of Colorado. There is no conflict with the law of another jurisdiction. The facts, therefore, show the controlling application of the *Bob-Lo* case.

V

The Colorado Anti-Discrimination Act Prohibiting Racial, Creedal and Ancestral Discrimination in Private Employment in No Way Burdens Interstate Commerce. It Supplements Established National Policy and Facilitates, Rather Than Impedes, the Free Flow of Interstate Commerce.

The Colorado Anti-Discrimination Act as applied to Continental, an interstate air carrier, demonstrates how the Act frees interstate commerce from the obstructive burden of discriminatory employment. Marlon D. Green, with 3,071 flying hours, was rejected because he is a Negro. Continental hired Stearns, Bryant, Dresser and Cole who had less than the minimum flight hours required by Continental's qualifications. These men were put to work flying Continental aircraft in interstate commerce. The Commission found that Green was "better qualified for the position of co-pilot than any applicant interviewed * * *" (R. 225). When the best qualified pilot—who served the Air Force so well—was turned away because his skin is the wrong color and pilot positions were given to the less qualified with a more correct ancestry, are not the lives of all passengers endangered and commerce obstructed by Continental's discrimination?

The free flow of Continental's aircraft into interstate commerce would have been facilitated by the employment of the qualified rather than by the prejudiced preferment of the less qualified.

When state regulations ensure employee competency, or reduce safety hazards without substantial interference with interstate movement of the vehicle, they are found to be an aid to interstate commerce, friendly, not an inter-

ference with it, and are valid. *Smith v. Alabama*, 124 U.S. 465 (1888), the state statute requiring interstate railroad employees to be examined for competency, was sustained even though the employees performed their duties in interstate commerce. *Terminal R.R. Assn. v. Brotherhood of R.R. Trainmen*, 318 U.S. 1 (1943), the statute requiring cabooses on certain trains, is in the interest of public safety.

National policy gives overriding precedence to the civil rights of citizens to prepare themselves by education for, and to engage in, the common occupations of life (*Brown v. Board of Education*, 347 U.S. 483 at 493 (1954); Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1947); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Cooper v. Aaron*, 358 U.S. 1 at 16-17 (1958)). The civil rights of citizens to equal employment must be given overriding consideration in deciding questions of state and national interests. The national policy is expressed in the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is so paramount that the decree of a state district judge is treated as state action denying equal protection of the laws when the decree enforces unemployment on racial grounds. (Cf. *Shelley v. Kraemer*, *supra*; *Barrows v. Jackson*, *supra*, and *Cooper v. Aaron*, *supra*.) Even if the decision of a state judge is contrary to a state statute, the decree of the state judge is state action within the meaning of the equal protection clause of the Fourteenth Amendment. It is just as invidious and contrary to the Fourteenth Amendment as is a policeman's action in violation of the due process clause (Cf. *Monroe v. Pape*, 365 U.S. 167 (1961)).

The application of the Colorado Anti-Discrimination Act by the decision of the Colorado Anti-Discrimination Commission requiring Continental to hire Green, the better

qualified pilot, supplements the established national policy of the Fourteenth Amendment, and would have facilitated the free flow of Continental's aircraft into interstate commerce.

VI

Even If Compliance With the Colorado Anti-Discrimination Act Was an Inconvenience to an Interstate Employer of Flight Crew Personnel, It Was a Much Smaller Burden Than the Nebraska Tax on Eighteen Stops a Day Sustained in Braniff Airways v. Nebraska State Board, 347 U.S. 590 at 598-599 (1954).

In *Morgan v. Virginia*, 328 U.S. at 377, the majority recognized the lack of preciseness in the abstract principles used to test whether "particular state legislation, in the absence of action by Congress, is beyond state power". Mr. Justice Black's concurring opinion indicates how there can be uncertainty in the application of these abstract principles when applying "pure questions of policy" under the phrase "undue burden" in interstate commerce. Braniff Airways had its home port and overhaul base for aircraft in Minnesota and flew a circuit with take-offs and landings in fourteen states, including Nebraska. The stops in Nebraska were only for the discharge and loading of passengers and property. The State of Nebraska levied an apportioned ad valorem tax on Braniff's flight equipment. Braniff, like Continental in the Green case, claimed that it was certified by the Civil Aeronautics Authority and was engaged in interstate commerce, and thus, under the commerce clause of the Federal Constitution, it was not subject to state regulation, but only to the exclusive right of the national Congress to regulate commerce among the states. The majority opinion of this court, in *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 at 598-599 (1954), held:

"In relying upon the Commerce Clause on this issue and in not specifically claiming protection under the Due Process Clause of the Fourteenth Amendment, appellant names the wrong constitutional clause to support its position. While the question of whether a commodity on route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process."

Continental failed to introduce any evidence of burden on interstate commerce and any evidence of any conflict between state laws. Its objection to the inconvenience of complying with the Colorado Anti-Discrimination Commission's order may, in substance, be an invocation of the due process clause. When the due process clause supports the Nebraska tax on eighteen stops a day on an airline with its home port concentrated in Minnesota, certainly the due process clause supports the application of the Colorado Anti-Discrimination Act to Continental with its headquarters, 800 employees, and all hiring at Denver, Colorado (R. 98, 99 and 109).

VII

The Colorado Anti-Discrimination Act, as Applied to Continental, Did Not Conflict With Any Federal Act Such as the Civil Aeronautics Act or the Railway Labor Act.

Congress has remained silent and not passed a federal fair employment practice act, nor a federal equal employment opportunity act prohibiting racial and creedal discrimination by employers engaged in interstate commerce. Neither the Civil Aeronautics Act nor the Railway Labor Act applies to employment to the exclusion of the Colorado Anti-Discrimination Act.

The Civil Aeronautics Act (49 U.S.C. Section 401, et seq.) regulates passenger rates and services. It does not apply to racial discrimination by employers.

In determining whether or not Congress has pre-empted a field, we can be guided by this Court's statement in the *Cors* case that "Congress must clearly manifest an intention" to exclude state regulation "before the police power of the state is powerless". The Civil Aeronautics Act, on this test, shows no clear intent by Congress to exclude state regulation.

Continental claims the Railway Labor Act has pre-empted the area. When the argument of pre-emption is made in the area of industrial relations, we are guided by the principle stated in *Sau Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) as follows:

"When the exercise of state power over a particular area of activity *threatened interference with the clearly indicated (federal) policy of industrial relations*, it has been judicially necessary to preclude the States from acting." (Emphasis added.)

The Railway Labor Act (45 U.S.C. 151, et seq.) contemplates the establishment of rates of compensation, hours, and working conditions through collective bargaining. Green could not have been helped or hurt by Continental's collective bargaining contract with the American Pilots Association under the Railway Labor Act. Continental had the right to hire whomever it pleased on a one-year probationary basis. During the one-year probationary period, it had the right to discharge without question (R. 125, 129).

The Railway Labor Act was not intended to be and is not a fair employment practice act (*Hayes v. U.P. Railroad Co.*, 88 Fed. Supp. 108 (1950), *affd.* 184 Fed. 2d 337 (1950)). It does not impose a duty upon the employer to act without discrimination. A duty to act without discrimination is imposed on the statutory bargaining agent, but the statute does not pre-empt the field of race discrimination in hiring applicants for employment (*Steele v. Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944), especially the concurring opinion of Mr. Justice Murphy at 208-209, and *Conley v. Gibson*, 355 U.S. 41 (1957)). *Conley* holds the Railway Labor Act does not give exclusive jurisdiction to the Railway Adjustment Board over a dispute between a Negro workman and the union so as to preclude a suit for declaratory judgment, injunction and damages.

Clearly, the Railway Labor Act does not expressly protect racial discrimination and does not expressly prevent racial discrimination so as to immunize an interstate carrier from the Colorado Anti-Discrimination Act.

Under the *Garmon* and *Corsi* principles of pre-emption, the Railway Labor Act does not manifest a clear intention of exclusion and the Colorado Anti-Discrimination Act does not threaten interference with a clearly indicated federal policy of industrial relations.

The policy of federal industrial relations precluding from racial discrimination was first reflected in the National Labor Relations Act. One year after that Act was held constitutional by this Court, it said in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 561 (1938): "Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."

In federal industrial relations, neither by the Railway Labor Act nor the Civil Aeronautics Act did Congress evidence an intent to pre-empt the field and establish a ban against discrimination in employment by employers engaged in interstate commerce. It is admitted that Congress could have pre-empted the field by enacting a federal fair employment practice act with a clear statement of intention that the application of state fair employment acts did not apply to interstate commerce, but as was mentioned above, such a federal law has not been passed.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment and decision of the Colorado Supreme Court be reversed. Further, Green asks this Court also to consider the entire case and to indicate its approval of the order of the Colorado Anti-Discrimination Commission so the litigation will be cut short. Otherwise, Continental will benefit from its discrimination by protracted delay.

Respectfully submitted,

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January 11, 1963

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IN THE
**SUPREME COURT OF THE
UNITED STATES**

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION and **EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER, GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE, and GEORGE O. CORY**, as members of said Commission,
Petitioners,

vs.

CONTINENTAL AIR LINES, INC., Respondent.

BRIEF OF PETITIONERS

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vs.

CONTINENTAL AIR LINES, INC., Respondent.

BRIEF OF PETITIONERS

A. REFERENCE TO OPINIONS BELOW

The opinion sought to be reviewed is reported as *The Colorado Anti-Discrimination Commission, et al. v. Continental Air Lines, Inc.*, (1962)Colo....., 368 P. (2d) 970. This opinion is not as yet reported in the official reports of the Colorado Supreme Court. (R. 288-314)

B. GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), 62 Stat. 929, because the validity of the Colorado Anti-Discrimination Act of 1957 is questioned on the ground that its application to the hiring practices of an employer engaged in interstate commerce is repugnant to the Constitution of the United States.

C. CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED.

The constitutional provisions, treaties, statutes, ordinances and regulations which this case involves, together with their official citations are as follows:

1. Article I, Section 8, Clause 3 of the Constitution of the United States.

“Powers of Congress — The Congress shall have power:

“(3) To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”

2. Section 4 of the Enabling Act of the State of Colorado (18 Stat. 474, Colorado Revised Statutes of 1953, Vol. I, p. 273, at 238).

“* * * ; Provided, that the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence.”

3. The Colorado Anti-Discrimination Act of 1957 (Session Laws of Colorado, 1957, p. 492-500, Colorado Revised Statutes of 1953, Vol. 8, Perm. Cum. Supp., pp. 1008-1013) in applicable parts.

“80-24-2. Definitions.—

“(5) * * * * ‘Employer’ shall mean the State of Colorado or any political subdivision or board, commission, department, institution or school district thereof and every other person employing six or more employees within the state; * * * .”

“80-24-6. Discriminatory and unfair employment practices.—

“(2) * * * * For an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified because of race, creed, color, national origin or ancestry.”

D. QUESTION PRESENTED FOR REVIEW

Does the Colorado Anti-Discrimination Act of 1957, which prohibits discrimination because of race in the hiring practices of the respondent, an interstate air carrier, conflict with the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States by being either an undue burden on interstate commerce or prohibit by the preemption of this field by the laws of the United States, namely the Railway Labor Act, the Civil Aeronautics Act of 1938, the Federal Aviation Program Act or federal executive orders.

E. STATEMENT OF THE CASE

Marlon D. Green was a captain in the United States Air Force serving as a pilot on a tour of duty in Japan when he became interested in becoming a commercial airline pilot. He sent letters to the major airlines seeking employment, but without success. Shortly after his return to the states in April, 1957, he applied for employment as a pilot with respondent, Continental Air Lines, Inc., hereinafter called Continental. (R. 34-35). Upon receipt of the letter of application, Continental advised Green it was not hiring pilots at that time, but would keep his application on file. (R. 35).

In June, 1957, Continental began recruiting for some fourteen or fifteen pilots. Continental at that time sent Green an invitation to come to Denver for an employment interview not knowing Green was a negro. (R. 36, 175). Green arrived in Denver on June 24, 1957 where he took and passed a link trainer and flight test administered by Continental (R. 38 - 44). Green and five other applicants were all considered for employment at about the same time by Continental. They were all found to be qualified (R. 124-125) but of the six applicants, Green had by far the greatest amount of flying experience, particularly in multi-engine planes, as is indicated by the following composite table:

	Total Hours	First Pilot	Co- Pilot	Multi Engine	
Green	3071:30	1838:15	778:45	2900:00	(R. 217, 192)
George	2100:53	1145:35	874:13	897:23	(R. 201, 220)
Stearns	1200:00	750:00	450:00	934:00	(R. 205, 220)
Bryant	1150:00	1160:00	—	5:00*	(R. 213, 221)
Dresser	1031:00	916:00	—	—	(R. 209, 221)
Cole	1000:00	900:00	100:00	200:00	(R. 197, 222)

* Acquired between June 25, 1957, when Green and Bryant were examined and July 1, 1957.

Mr. Harold Bell, Vice-President in charge of personnel for Continental admitted Green was a qualified pilot. (R. 114). Mr. Sorby, Manager of Employment and Employee Relations of Continental said of Mr. Green, "All you have to do, I think, is shake hands with the fellow and you realize you have a pretty good boy. He is very friendly. I have been impressed with him right along." (R. 154).

Four of the five who applied with Green were asked to enter Continental's training program in July, 1957 (R. 120) and the fifth was asked in September, 1957. (R. 127). Meanwhile in August, 1957, Continental hired ten other pilots. (R. 102). Green was never given an interview or a physical examination, nor was he asked to enter Continental's training program. Because of alleged bad publicity, Continental ceased to consider Green as an applicant after early August (1957) when an article appeared in a newspaper concerning Green and his legal action against various persons and companies. (R. 104, 183-185).

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission (R. 1-2) and in its Answer Continental set up defenses of conflict with the commerce clause of the federal constitution, Article I, Section 8, and that the federal government had pre-empted the field. (R. 6). The Anti-Discrimination Commission held a hearing on the merits of the case on May 7, 8, 1958 (R. 7-223), and on December 19, 1958 the Commission entered its Findings of Fact, Conclusions of Law and Orders in the case. (R. 223-226). Continental was ordered to give Green the first opportunity to enroll in its next training class with a priority status of June 24, 1957 (R. 225-226). The Commission found "that the only reason that the complainant was not selected for the training school was because of his race." (R. 225)

Continental appealed the decision of the Commission to the District Court of Denver, Colorado. Again, Continental raised the constitutional questions. At the time, Green had his first opportunity to resort to the 1875 Enabling Act of the Congress of the United States, which he did in the Answer he filed. (R. 247) The District Court remanded the case to the Commission to make findings of fact as to whether Continental was engaged in interstate commerce, whether Continental was subject to the anti-discrimination statute, and whether the employment for which Green had applied actually involved interstate commerce. As a result the Commission entered a new decision and purported to vacate its original one. The District Court then held that such action rendered the complaint moot. Upon review in the Colorado Supreme Court by writ of error, *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.* (1960), 143 Colo. 590, 355 P. (2d) 83, the Supreme Court held the Commission was without power to withdraw its first decision and the second decision was void. The District Court was directed to rule on the first decision of the Commission.

In the District Court in the proceedings which followed the parties entered into a stipulation that: (1) Continental was engaged in interstate commerce; (2) the Commission would find Continental was subject to the Colorado Anti-Discrimination Act of 1957; and (3) the job Green applied for involved interstate operations. (R. 256-257) After hearing arguments and the submission of written briefs, the District Court entered extensive Findings of Fact, Conclusions of Law, and Judgment as of January 7, 1961 (R. 257-286), holding that as applied to Continental the Anti-Discrimination Act was an unreasonable burden upon interstate commerce and hence invalid under the commerce

clause and that by the Railway Labor Act, the Civil Aeronautics Act, the federal executive orders, Congress had pre-empted the field.

Writ of Error was then brought to the Colorado Supreme Court, *Colorado Anti-Discrimination Commission, et. al. v. Continental Air Lines, Inc.* (1962),Colo....., 368 P. (2d) 970, which affirmed the trial court judgment on the ground that the Colorado statute offended the commerce clause. (R. 288-314)

Green and the Commission both applied for certiorari to this Court, the same being granted on October 8, 1962. (R. 314-316)

F. SUMMARY OF THE ARGUMENT

The Colorado supreme court failed to recognize that *Hall v. DeCuir*, (1877) 95 U.S. 485, which was decided in 1877, concerned a state anti-discrimination statute which did in fact create a burden upon interstate commerce at that time; but, that same statute today would not create such a burden. The court also refused to recognize that in the more recent cases where *Hall v. DeCuir*, *supra*, has been cited, the court was considering a discrimination statute—not an anti-discrimination statute. If the principle of *Hall v. DeCuir*, *supra*,—that a burden on interstate commerce must be found to exist before the law is unconstitutional—is properly applied in the case at bar to the Colorado Anti-Discrimination Act of 1957, the Act must be found to be constitutional because no burden on interstate commerce can be found to exist.

Also, none of the statutes or executive orders cited by

the trial court, and indirectly approved by the Colorado supreme court, support the conclusion that Congress has expressed a clear intent to preempt the field of anti-discrimination legislation relating to hiring practices of employers even though such employer is engaged in interstate commerce.

G. ARGUMENT

1. Statutes which allow discrimination by an interstate carrier are prohibited by the commerce clause of the federal constitution because they are a burden upon interstate commerce; but, an *anti-discrimination* statute does not create such a burden on or interfere with interstate commerce and is constitutional.

The crux of the opinion of the Colorado supreme court in the case at bar is found in the following conclusion which the court stated in its opinion at page 973 of 368 P. (2d) and (R. 294), to-wit:

"Racial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States., the opinions of the U. S. Supreme Court have established the rule."

As support for this conclusion, the court cited and relied heavily upon the case of *Hall v. DeCuir* (1877), 95 U. S. 485, 24 L. Ed. 547.

We submit that the foregoing conclusion expressed by our court is erroneous. Examination of the case cited

above, as well as other cases which are applicable, discloses that no such conclusion has been established as a matter of law. It is true that *Hall v. DeCuir*, supra, was a case concerning a Louisiana statute prohibiting discrimination against passengers because of race in the accommodations furnished to them on a boat which travelled on the Mississippi river. Therein, this court struck down that statute because it created an undue burden on interstate commerce. Our court must have believed that because the *Hall v. DeCuir*, supra, decision was cited in *Morgan v. Virginia* (1946) 328 U. S. 373 and in *Huron Portland Cement Company v. City of Detroit* (1960) 326 U. S. 440, it established the conclusion as stated by our court.

The reason for this erroneous conclusion is that the court failed to distinguish between discrimination statutes and anti-discrimination statutes as they pertain to interstate commerce and their present affect thereupon. Further, the court refused to acknowledge that *Hall v. DeCuir*, supra, "has been eroded and devitalized" and "has no vitality today", (R. 295) and 368 P. (2d) 970, 974. The court also misapprehended the guiding principles laid down in *Hall v. DeCuir*, supra, and erroneously applied the facts of that case rather than those principles.

The principles of *Hall v. DeCuir*, supra, if properly applied support our conclusion and position that an anti-discrimination statute of a state can presently be applied to an interstate air carrier without running afoul of the commerce clause of the federal constitution. The principles of *Hall v. DeCuir*, supra, to which we have reference are as follows:

"There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has often been said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the constitution'.

.....

The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.

But we think it may safely be said that State legislation which seeks to impose a burden upon inter-state commerce or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.

....."

In summary, then, it can safely be said that a state anti-discrimination statute applicable to interstate carriers is not *per se* prohibited by the commerce clause. This court did not state in *Hall v. DeCuir*, supra, that anti-discrimination required of an interstate carrier is a subject which by its own nature becomes a "no man's land"

insofar as state legislation is concerned, as the Colorado supreme court has concluded. What *Hall v. DeCuir* stands for is that if the state legislation creates a *burden* on or *interferes directly* with interstate commerce, then, and only then, such legislation is prohibited.

With this thought in mind, let us reflect a bit about the facts and circumstances in existence when *Hall v. DeCuir* was decided which, at that time, caused this court to conclude such an anti-discrimination statute did create a burden on and interfered directly with interstate commerce. *Hall v. DeCuir*, supra, was decided in 1877. This was at a period in the history of our country when it was lawful for a negro to be discriminated against. In those days he couldn't sit where he wanted to, eat where he wanted to, or go to school where he desired. This court recognized then that the negro, although legally free, was faced with certain obstacles in being completely accepted by the white man's society. Certain privileges enjoyed by persons of the white race were not obtainable by a colored person, *Civil Rights Cases* (1883) 109 U. S. 3, 25. Because of these legal, economic, and sociological circumstances, the Louisiana anti-discrimination statute in 1877 did create an undue burden on interstate commerce because it would have required passengers to change their cabins as the boat moved from one state to the other, depending on whether the state allowed or prohibited racial discrimination.

In this regard it must be remembered that a state which authorized discrimination in 1877 was doing a permissible thing. This was before our present times which stem from the line of cases beginning with *Shelly v. Kramer* (1948) 334 U.S. 1, *Brown v. Board of Education*

(1954) 347 U.S. 483, and *Cooper v. Aaron*, (1958) 358 U.S. 1. Today, such state discriminatory acts, ordinances or practices directed at interstate commerce would not be tolerated, *Morgan v. Virginia*, supra, *Brown v. Board of Education*, supra, *Boynton v. Virginia*, (1960) 364 U. S. 454. Therefore, that which constituted a burden-on or an interference with interstate commerce in 1877, is not necessarily a burden or an interference in today's commerce. As this court said, "It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved.", *Hall v. DeCuir*, supra.

We stated earlier in this brief that it appears our court misconstrued the reason for the citation of *Hall v. DeCuir*, supra, in later cases where discrimination statutes which affected interstate commerce were held to violate the commerce clause of the federal constitution by this court. By this statement, we have reference to the fact that in *Morgan v. Virginia*, supra, cited by the Colorado supreme court, the statute which was overthrown was a statute requiring segregation of negro passengers on busses travelling in interstate commerce which passed through Virginia. In Virginia such passengers were required to set in designated parts of the busses. This was clearly a burden on interstate commerce. In *Boynton v. Virginia*, supra, a state statute requiring negro passengers to eat in a segregated place at a bus terminal was overthrown as being a direct burden on interstate commerce. In addition to these two cases cited by our court there are other cases which fall into the same class. In all of these cases, the same pattern has evolved. The statute or ordinance concerned has required negro passengers to be segregated from the other passengers. Such

segregation, when applied to interstate carriers, under the present legal concepts as announced by this court, does, in fact, create an undue burden on and does directly interfere with interstate commerce just as much as the Louisiana statute did in 1877, which prohibited segregation of negro passengers.

But times, mores, customs, and legal concepts change. Today, it can't be categorically said that an anti-discrimination statute, *per se*, creates a burden on interstate commerce or interferes with its free flow. If one does so conclude, he must believe that it is still lawful to discriminate against negroes in matters pertaining to or connected with interstate commerce. He must completely disregard the holdings of this court as typified by the cases of *Morgan v. Virginia* and *Boynton v. Virginia*, *supra*. The fact that times change, that legal concepts change with the times, and that what was legal then may not be legal now, and vice-versa, is what our supreme court overlooked in relying primarily on *Hall v. DeCuir*, *supra*, as the foundation for its decision. *Hall v. DeCuir*, *supra*, is only applicable if a burden on interstate commerce is found to exist in the particular case under consideration, not because it concerned an anti-discrimination statute. In this regard, our trial court made no finding whatsoever that any burden was created or imposed upon the interstate commerce of Continental. The trial court merely concluded that a "no man's land" existed and our supreme court affirmed the position taken by the trial court. Neither court applied the true doctrine of *Hall v. DeCuir*, *supra*,—that each case must be looked at from its own merits and a determination made as to whether or not a burden is imposed upon interstate commerce. This is the key—the finding of a burden on interstate commerce—which un-

locks the door for a holding that the statute is unconstitutional because it violates the commerce clause of the federal constitution. Our courts never found the key, so to speak. Therefore, they didn't have the authority to hold the Colorado Anti-Discrimination Act of 1957 to be unconstitutional as applied to an interstate carrier such as Continental.

But, we might ask ourselves, could the court have found an undue burden on or a direct interference with interstate commerce? We believe they could not have so found because no burden or restriction exists. In the first place we are herein concerned with a statute that prohibits discrimination in the hiring practices of an employer. A statute which applies alike to all employers of six or more employees, whether or not they are engaged in interstate commerce, Section 80-24-2 (5), Colorado Revised Statutes of 1953, Vol. 8, Perm. Supp. As Justice Frantz pointed out in his dissenting opinion found at 368 P. (2d) 975, 977 and R. 296-309, a contract of employment is of a local nature and subject to local laws even though the employer is engaged in the interstate transportation of passengers. Had Green been hired he would not have caused any more burden on interstate commerce than would a colored passenger riding on the same plane. In the hearing before the Commission it was alleged indirectly that some people might not ride on the airplane because a negro was flying the plane (R. 84) or that a possible lack of harmony might exist in the cockpit because of the difference in race between the pilot and co-pilot (R. 92, 115), but these statements were never substantiated by competent evidence. On the contrary, it seems probable that passengers would be no more concerned about riding in a plane piloted by a negro than

they would be if they were required to ride as a passenger with a negro passenger. In this regard we believe it is safe to assume that most passengers would prefer to ride with a competent and qualified pilot rather than be concerned with the fact that he was a negro.

In any event, this record is completely devoid of any facts which would indicate to the slightest degree that the Colorado Anti-Discrimination Act of 1957 places any scintilla of a burden or restriction upon the interstate commerce engaged in by Continental. If anything, this statute assures compliance and conformity with the national policy as announced by this court insofar as interstate commerce is concerned and the burdens and restrictions thereupon. Therefore since no burden has been shown or can be shown by the Colorado Anti-Discrimination statute, *Hall v. DeCuir*, supra, is not controlling and has no application whatsoever to this case.

Further, with respect to the fact that we are herein concerned with an anti-discrimination statute regulating hiring practices, we believe it is important to note that the enabling act of the state of Colorado, supra, as passed by the United States Congress, specifically requires that the Constitution of the State of Colorado make no discrimination in the civil rights because of race or color. Therefore, the Colorado Anti-Discrimination Act is only a legislative expression of the Congressional mandate that the right to seek employment in Colorado is not to be denied because of the race or color of the person seeking the employment. As we state above, employment contracts are of a local nature and are subject to and controlled by local law. When Colorado protected these employment rights for all its citizens and denied infringement of those rights because

of race or color, Colorado was acting as it was directed to do by Congress when it passed Colorado's enabling act.

Even though such legislative expression by the Colorado legislature might indirectly affect interstate commerce, this is not a sufficient reason for striking down the Colorado Anti-Discrimination Act. In support of this premise we cite from *Huron Portland Cement Company v. City of Detroit*, supra, at page 443 of 362 U. S., to-wit:

"In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce; * * * * * never intended to cut the States off from legislating on all subjects relating to health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the constitution."

Also, at page 448, the following:

"It has not been suggested that the local ordinance, applicable alike to 'any person, firm or corporation' within the city, discriminates against interstate commerce as such. It is a regulation of general application, designed to better the health and welfare of the community. And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none. The record contains nothing to suggest the existence of any such competing or conflicting local regulations. *Bibb v. Navajo Freight Lines*, 359 U. S. 520. We con-

clude that no impermissible burden on commerce has been shown."

In the preceding argument we have shown why the Colorado Supreme Court was wrong in its basic premise by relying on *Hall v. DeCuir*, supra, to support its opinion. Now let us look to the other side of the problem. Here we find that although this court has not squarely stated what we believe to be true—that an anti-discrimination state statute which prohibits discrimination because of race by an employer in his hiring practices, be he involved in inter-state or intra-state commerce, does not violate the commerce clause of the federal constitution—this court has decided cases which indicate this premise to be valid.

One of the most important cases in this respect is that of *Railway Mail Association v. Corsi* (1945) 326 U. S. 88. In this case the argument was raised that the New York Anti-Discrimination Law, Section 43 of the New York Civil Rights Law, which prohibited denial of membership in a labor organization because of race or color, conflicted with Article I, Section 8, Clause 7 of the federal constitution, the clause giving congress power over the post offices and the post roads. This power is almost identical to the power granted by clause 3 over commerce. In rejecting this argument, this court said, at page 95, the following:

"* * *. Section 43 does not impinge on the federal mail service or the power of the government to conduct it. It does not burden the government in its selection of its employees or in its relations with them.
* * *. The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation in

volved a direct, physical interference with federal activities under the postal power or some direct immediate burden on the performance of the postal functions. (cases cited) And in at least one instance this court has sustained direct state interference with transmission of the mails where the slight public inconvenience arising therefrom was felt to be far outweighed by inconvenience to a state in the enforcement of its laws which would have resulted from a contrary holding. *United States v. Kwoley*, 7 Wall. 482, 486."

The foregoing principle is particularly applicable to the case at bar. In *Corsi*, supra, the Constitutional provision concerns authority of Congress to regulate postoffices. Herein, we are concerned with the power of Congress to regulate interstate commerce. Surely, if the state of New York can constitutionally legislate and by such legislation control the membership practices of the postoffice employees' organization, Colorado can legislate and control the hiring practices of an employer, even if an employer (Continental) is engaged in interstate commerce.

A later case which also indicates such legislation is constitutionally permissible is that of *Bob-Lo Excursion Co. v. Michigan* (1948) 333 U. S. 28. This case involved a Michigan civil right statute which guaranteed all persons within the jurisdiction of Michigan equal treatment in public places or facilities. When a colored person attempted to ride a boat owned by Bob-Lo the person was refused passage. Later a criminal action was brought against appellant, Bob-Lo, who was found guilty. The Supreme Court of Michigan affirmed rejecting appellants' arguments that the statute violated the commerce clause of the federal constitution. We think this court in rendering its

opinion therein made a comment on page 40 thereof, which is particularly applicable to the case at bar, to-wit:

“ * * * Certainly there is no national interest which overrides interest of Michigan to forbid the type of discrimination practiced here.”

Nothing could be said that would be more true of the case at bar. There is nothing in our national policy that would prohibit the discrimination (anti-discrimination) practiced by Colorado in its Anti-Discrimination Act of 1957.

2. There are no legislative enactments which indicate a clear intent on the part of Congress to pre-empt the field of anti-discrimination in employment practices of air carriers operating in interstate commerce.

Since 1942 there has been some kind of fair employment legislation introduced in each Congress. These bills generally have contained provisions prohibiting discrimination in employment because of race or color and they would have been applicable to an employer engaged in interstate commerce. None of these bills were enacted into law. Had such been done, undoubtedly, this case would not now be before this court. However, absent such federal legislation in this area, the proposition that the field has been preempted by Congress or by executive order is baseless.

Although the Colorado supreme court did not expressly state that its opinion was founded upon the premise that the field had been preempted, it can be inferred such is the case. Such conclusion is founded upon the fact that

the trial court dwelt at length on this proposition in its decision. When this was reviewed, the supreme court in its opinion said, "The findings, conclusions and judgment of the trial court might well be adopted in toto as the opinion of the court.", 368 P. (2d) 973, R. 293.

The trial court relied upon three federal laws as the basis for its conclusion, stated on page 274 of the record, as follows:

"By virtue of any one of several federal statutes and regulatory systems an interstate air carrier is prohibited from racial discrimination. As to those employers, federal legislation pre-empts the field."

The three laws are: (1) The Railway Labor Act, 45 U.S.C., Secs. 151, 181, *et seq*; (2) The Civil Aeronautics Act, 49 U.S.C., Secs. 401, *et seq* (now the Federal Aviation Program Act, 49 U.S.C., Secs. 1301, *et seq*); and (3) The Interstate Commerce Act, 49 U.S.C., Secs. 1, 301, 901, 1001, *et seq*.

The Railway Labor Act cannot be said to be applicable to the hiring practices of an airline because this is not one of the enumerated purposes of the act, found in Section 151a, 49 U.S.C., which reads as follows:

"The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-

organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, §2, 44 Stat. 577; June 21, 1934, c. 691, §2, 48 Stat. 1186."

Cases which have arisen under this act and relied upon by the trial court, and indirectly by the supreme court, have for the great part been concerned with labor organizations and that they represent all employees equally, without regard to race or color, *Steele v. Louisville and Nashville R. R. Co.* (1944) 323 U.S. 192; *Brotherhood of R. R. Trainmen v. Howard* (1952) 343 U.S. 768; and *Conley v. Gibson* (1957) 355 U.S. 41. However, the results of these cases do not transform the Railway Labor Act into a federal Fair Employment Practices Act for rail and air carriers.

A second facet of this premise is that the Civil Aeronautics Act, *supra*, was found by the trial court to be applicable and to be a preemption of the field by Congress. Examination of the purposes of this Act does not disclose anything that would indicate the Act was intended to cover discrimination in hiring practices. The only "discrimination" mentioned in the Act is "discrimination" in service provided to customers. Section 402(c) of 49 U.S.C. spells out the over-all policy of the Act as "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive

competitive practices." Section 484, thereof, expressly describes the kinds of discrimination to which Section 402(c), *supra*, refers. It is declared that:

"No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Clearly, the discrimination therein expressed is limited to discrimination in service or gainst passengers.

The trial court also mentioned Sections 551-560 of the Act, 49 U.S.C. These sections are found under Sub-chapter VI, entitled "Civil Aeronautics Safety Regulations." It is quite apparent that sections under this heading would have no application to racial discrimination in the hiring practices of an interstate air carrier.

With respect to the cases cited by the trial court which concerned the Civil Aeronautics Act, none were concerned with employment practices of an air carrier. Therefore, there is absolutely nothing upon which a foundation can be laid to support the conclusion that by enacting the Civil Aeronautics Act, Congress intended to preempt the field of anti-discrimination in the hiring practices of an interstate air carrier.

All that has been said hereinbefore about the Railway Labor Act and the Civil Aeronautics Act—that they do

not indicate an intention on the part of Congress to preempt the field of preventing discrimination in the hiring practices of air carriers — can also be said of the Interstate Commerce Act or any cases cited in relation thereto by the trial court.

H. CONCLUSION

The foundation of the opinion of the Colorado supreme court in this case is built entirely upon the case of *Hall v. DeCuir*, supra. If this case fails under an attack upon it; then, likewise, the Colorado decision must also fail.

We believe that it has been conclusively shown herein that *Hall v. DeCuir*, supra, does not establish that a state anti-discrimination statute regulating hiring practices is unconstitutional, *per se*, even though it is applied to an interstate air carrier because this is not a "no man's land" for state legislation, as the Colorado supreme court would lead one to believe.

Hall v. DeCuir stands for the principle that if a burden or interference is imposed upon interstate commerce, then, and only then, will the state law be held to be unconstitutional. Here no burden or interference was found to exist. Nor can any be found to exist. As a result the reasoning of the Colorado supreme court is unsound and its opinion erroneous.

In addition, neither the Railway Labor Act, the Civil Aeronautics Act, the Interstate Commerce Act, or federal executive orders indicate any attempt by the federal government, to preempt this field.

Therefore, the opinion of the Colorado supreme court must be reversed and the orders of the Anti-Discrimination Commission of Colorado be affirmed (R. 225-226). Further, this court is requested to enter any other and additional orders and judgments deemed just and equitable to the respondent, Marlon D. Green, to protect his interests in these premises.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION and
EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE,
and GEORGE O. CORY, as members of said Commission,

Petitioners,

vs.

CONTINENTAL AIR LINES, INC.

**On Writ of Certiorari to the Supreme Court
of the State of Colorado**

**BRIEF OF THE AMERICAN JEWISH CONGRESS,
AMERICAN CIVIL LIBERTIES UNION, AND
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., AS AMICI CURIAE**

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Pa. Stats. Ann., Tit. 18, Sec. 4654 (1945)	13
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Vt. Stats. Ann., Sec. 1451	13
Wash. Rev. Code, Sec. 49.60.040 (1956)	13
Wash. Rev. Code Secs. 49.60.010 to 49.60.310 (Supp. 1957), as amended by L. 1959, C. 58	7, 28

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Wis. Stat. Ann., Sees. 111.31 to 111.37 (Supp. 1959, as amended by L. 1959, C. 149)	8
Wis. Stats. Ann., Sec. 942.04 (1956)	13
Wyo. Stats. Ann., Sec. 6-83.1	13

Miscellaneous:

Elson and Schanfield, <i>Local Regulation of Discrimi- natory Employment Practices</i> , 56 Yale L. J. 431 (1947)	8
Emerson & Haber, <i>Political and Civil Rights in the U. S., Vol. II</i> (1958)	27
<i>Employment Discrimination</i> , 5 R. R. L. R. 569 (1960)	9
Executive Order No. 8802, 6 <i>Fed. Reg.</i> 3109 (1941)	27
Fair Employment Practice Committee, <i>First Report</i> (1945)	27
Fair Employment Practice Committee, <i>Final Report</i> (1947)	27
H. Rep. No. 951, 80th Cong., 2nd Sess. (1948)	21, 29
H. Rep. No. 1,165, 81st Cong., 1st Sess. (1949)	29
H. Rep. No. 1,370, 87th Cong., 2nd Sess. (1962)	21, 29
Konvitz and Leskes, <i>A Century of Civil Rights</i> , (1961)	30
McNamara, <i>Jurisdictional and Commerce Problems</i> , 8 Law and Contemporary Problems 482 (1941)	24
Myrdal, <i>An American Dilemma</i> (1944)	26
New York State Commission Against Discrimination, Statement before the U. S. Senate Subcommittee on Labor and Labor Management Relations, April 16, 1952	20

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<i>Pennsylvania Fair Employment Practice Act, 17 U. Pitt. L. Rev. 438 (1956)</i>	9
<i>President's Committee on Civil Rights, Report, To Secure These Rights (1947)</i>	29
<i>Sen. Rep. No. 290, 79th Cong., 1st Sess. (1945)</i>	29
<i>Sen. Rep. No. 1,109, 79th Cong. 1st Sess. (1945)</i>	29
<i>Sen. Rep. No. 2,080, 82nd Cong. 2d Sess. (1952)</i>	29
<i>Temporary Commission Against Discrimination, Report, Legislative Document (1945) No. 6</i>	27
<i>The New Pittsburgh Fair Employment Practices Ordinance, 14 U. Pitt. L. Rev. 604 (1953)</i>	8
<i>The New York State Commission Against Discrimination: A New Technique for an Old Problem, 56 Yale L. J. 837 (1947)</i>	9
<i>The World Almanac, 1960</i>	22
<i>United States Commission on Civil Rights, Fifty States Report (1961)</i>	30
<i>United States Commission on Civil Rights, 1961 Report, Book 3, "Employment"</i>	29
<i>Waite, Constitutionality of the Proposed Minnesota Fair Employment Practices Act, 32 Minn. L. Rev. 349 (1948)</i>	9
<i>Weaver, Negro, Labor A National Problem (1946)</i>	27

IN THE
Supreme Court of the United States
October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION and
EDWARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEBLER, GEORGE J. WHITE,
and GEORGE O. CORY, as members of said Commission,
Petitioners,

vs.

CONTINENTAL AIR LINES, INC.

**On Writ of Certiorari to the Supreme Court
of the State of Colorado**

**BRIEF OF THE AMERICAN JEWISH CONGRESS,
AMERICAN CIVIL LIBERTIES UNION, AND
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC., AS AMICI CURIAE**

Statement of the Case

This case arises under the Colorado Anti-Discrimination Act of 1957 (Colo. Rev. Stat. Ann. 1953 (1957 Supp.), Secs. 80-24-1 to 80-24-8). Section 80-24-6(1) and (2) of that law prohibits discrimination in employment on the basis of race, creed, color, national origin or ancestry.

Under Section 80-24-2(5), this provision is made applicable to "every other person employing six or more employees within the state."

In April, 1957, Marlon D. Green, a Negro, filed an application with respondent, Continental Air Lines, Inc., for employment as a pilot. Green was interviewed by respondent and required to fill out an application form that designated his race. In the succeeding months, a number of white applicants were hired as pilots but Green was not hired.

On August 13, 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission, petitioner herein, which administers the Anti-Discrimination Act. The Commission investigated the complaint, held a hearing and issued its decision holding that Green was fully qualified for the position he had applied for and that respondent had failed to hire him solely because of his race. It rejected a number of defenses raised by respondent, including its claim that the anti-discrimination statute could not be applied to its operations because of their interstate character.

Respondent appealed the Commission's decision to the State District Court. Thereafter, further proceedings were had on the issue of the interstate nature of respondent's operations. Ultimately, the Commission and respondent entered into a stipulation that respondent was engaged in interstate commerce and that the job that Green applied for involved interstate operations. Thereupon, the District Court issued its decision setting aside the Commission's order solely on the ground that, because respondent was engaged in the interstate transportation of passengers, the state Anti-Discrimination Act could not constitutionally

apply to its hiring of personnel. The Colorado Supreme Court affirmed, by a vote of four to three, holding "that with reference to interstate carriers the regulation of racial discrimination is a matter in which there is a 'need for national uniformity,' and that the states are without jurisdiction to act in that area."

The Question to Which this Brief is Addressed

May a state statute prohibiting discrimination in employment because of race, religion or national origin be constitutionally applied to the employment practices of an interstate airline?

Interest of the Amici

The American Jewish Congress is an organization of American Jews established in part "to help secure and maintain equality of opportunity for Jews everywhere, and to safeguard the civil, political, economic and religious rights of Jews everywhere." It established its Commission on Law and Social Action in 1945, in part "to fight every manifestation of racism and to promote the civil and political equality of all minorities in America."

The American Civil Liberties Union is a 42-year old, private, non-partisan organization engaged solely in the defense of the Bill of Rights. Its principal interests are freedom of speech and association, due process of law, and the equal protection of the laws.

The N. A. A. C. P. Legal Defense and Educational Fund, Inc. is an organization dedicated to the task of broadening

democracy and securing equal justice under the Constitution and laws of the United States. It seeks through legal redress to assure these rights to all Negroes.

Each of these organizations has in the past been actively engaged in combatting discrimination in employment based on race, religion or national origin. They are, therefore, deeply concerned by the decision of the court below which, if allowed to stand, would preclude application to a substantial and vital segment of the nation's economy of the many state and local fair employment laws that have operated effectively in this country for more than 17 years.

The parties to this proceeding have consented to the filing of this brief.

Summary of Argument

1. Application of the Colorado statute to respondent's operations is not barred by the doctrine of pre-emption because Congress has not indicated any intent to bar such application.

A. No agency of the Federal Government has moved to halt application to interstate transportation of the many state laws prohibiting employment discrimination or even of the older and more numerous laws against discrimination in transportation facilities. State fair employment laws have been widely applied to interstate commerce and interstate transportation.

B. The various federal statutes dealing with interstate transportation have not been applied to employment discrimination. Neither can it be said that the Congressional

plan of regulation is so comprehensive as to preclude state regulation of untouched areas. Finally, even if there is federal regulation of this area, it does not, by itself, preclude state regulation that serves the same policy.

II. The Colorado statute is not a burden on interstate carriers.

A. No showing has been made that carrier operations are encumbered by the anti-discrimination requirement. The 17 years of experience with fair employment laws shows that employers have operated freely and successfully under their terms.

B. There is no possibility of subjecting carriers to conflicting requirements where uniformity is necessary. The Constitution itself makes it impossible for any state to adopt a law requiring employment discrimination. Moreover, inconsistent regulation of employment practices would not create the kind of difficulty in operation that has been held decisive in the case of statutes affecting the actual operation of railroad trains and other transportation units.

III. If the Colorado statute does impose any burden on interstate carriers, it is a minimal burden and the national interest in its elimination is far outweighed by the state interest in the elimination of employment discrimination. The various state anti-bias laws deal with an evil known to have extensive harmful effects. They are a normal and successful exercise of the police power. No countervailing interest of the Federal Government requires the result reached below.

ARGUMENT

The United States Constitution does not bar application to an interstate airline of the Colorado statute prohibiting discrimination in employment on the basis of race, religion or national origin.

The question in this case is whether a state statute affecting an aspect of commerce among the states is rendered invalid because of a claimed inconsistency with the constitutional power of the Federal Government to regulate interstate commerce. The principles governing the determination of such questions were recently reviewed by this Court in *Huron Portland Cement Co. v. Detroit*, 362 U. S. 440 (1960). It was there held that a municipality may regulate the health aspects of machinery on ships operating under a federal license in interstate commerce.

Reviewing earlier decisions, this Court described them as holding that, in the exercise of the police power, "the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government" (362 U. S. at 442) and that "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless pre-empted by federal action * * * or unduly burdensome on maritime activities or interstate commerce * * *" (*id.* at 443). This Court further said that a Congressional intent to pre-empt state regulation "is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state" (*ibid.*).

We submit that application of the Colorado fair employment law to respondent's operations is not barred by these principles.

I

Congress has not indicated an intent to bar state regulation of racial discrimination in employment by persons engaged in interstate commerce.

A. Congress has accepted state regulation of this area.

The argument that Congress has acted so as to bar state regulation of employment discrimination ignores the fact that state laws on this subject have been in force for many years and have regularly been applied to interstate carriers. No branch of the Federal Government has taken the position that those statutes invade an area occupied by federal regulation.

Since 1945, twenty-two states have adopted laws condemning discrimination in employment. Nineteen of these are in the form taken by the Colorado statute, that is, a prohibition of such discrimination with provisions for administrative rather than penal enforcement. The first such laws were adopted in New York and New Jersey in 1945.¹ Subsequent laws were adopted in Massachusetts in 1946,² Connecticut in 1947,³ New Mexico, Oregon, Rhode Island and Washington in 1949,⁴ Michigan, Minnesota and Penn-

1. N. Y. Exec. Law Secs. 290-301 (1951); N. J. Rev. Stat. Secs. 18:25-1 to 18:25-28 (Supp. 1958).

2. Mass. Ann. Laws, Ch. 151B, Secs. 1 to 10 (Supp. 1958).

3. Conn. Gen. Stat. Secs. 31-122 to 31-128 (1958), as amended, Pub. Act No. 145 (1959).

4. N. M. Stat. Ann. Secs. 59-4-1 to 59-4-14 (Supp. 1957), as amended by L. 1959, C. 296; Ore. Rev. Stat. 659.010 to 659.115 (Supp. 1957), 659.990 as amended by L. 1959, C. 584; R. I. Gen. Laws Ann. Secs. 28-5-1 to 28-5-39 (Supp. 1958); Wash. Rev. Code Secs. 49.60.010 to 49.60.310 (Supp. 1957), as amended by L. 1959, C. 58.

sylvania in 1955,⁵ Colorado and Wisconsin in 1957,⁶ California and Ohio in 1959⁷ and Illinois, Kansas and Missouri in 1961.⁸ Alaska adopted such a law in 1953 when it was still a territory.⁹ In addition, Delaware in 1960 and Idaho in 1961 adopted fair employment laws containing penal rather than administrative sanctions.¹⁰ Finally, Indiana, in 1945, adopted a law condemning employment discrimination but containing no enforcement provisions.¹¹ Fair employment ordinances have also been adopted by a number of cities, most of them in states that subsequently enacted statewide legislation.¹²

The constitutionality of these statutes as applied to employers generally has never been seriously contested. That

5. *Mich. Stat. Ann.*, Secs. 17.458(1) to 17.458(11); *Minn. Stat. Ann.* Secs. 363.01 to 363.13 (Supp. 1958); *Pa. Stat. Ann.* Tit. 43, Secs. 951 to 963 (Supp. 1958).

6. *Colo. Rev. Stat.* Secs. 80-24-1 to 80-24-8 (Supp. 1957); *Wis. Stat. Ann.* Secs. 111.31 to 111.37 (Supp. 1959), as amended by L. 1959, C. 149.

7. *Cal. Labor Code*, Secs. 1410 to 1432, *West's Ann. Code* (1961 Cum. Supp.); *Ohio Rev. Code*, Secs. 4112.01 to 4112.08, 4112.99.

8. *Ill. Smith-Hurd Ann. Stat.*, ch. 48, Secs. 851-866; *Kan. Gen. Stat. Ann.* 1949 (1957 Supp.), Secs. 44-1001 to 44-1008; *Mo. Ann. Stat.* (Vernon-Cum. Supps. 1960-1961), Secs. 296.010 to 296.070, 213.010 to 213.030.

9. *Alaska Comp. Laws Ann.*, Secs. 43-5-1 to 43-5-10 (Supp. 1957).

10. *Del. Code Ann.* (1960 Supp.), Ch. 7, Sub-ch. 2, Secs. 710 to 713; *Idaho Gen. L. Ann.* (1961 Supp.), Ch. 73, Secs. 18-7301 to 18-7303.

11. *Ind. Ann. Stat.* (Burn's 1961 Supp.), Secs. 40-2307 to 40-2317.

12. See Elson and Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 *Yale L. J.* 431 (1947); *The New Pittsburgh Fair Employment Practices Ordinance*, 14 *U. Pitt. L. Rev.* 604, 606-09 (1953).

is no doubt due in large part to this Court's 1945 decision in *Railway Mail Association v. Gors*, 326 U. S. 88, upholding the validity of an earlier New York state law prohibiting discrimination by labor unions. It is understandable that writers on this subject generally agree that fair employment legislation is constitutional. Waite, *Constitutionality of the Proposed Minnesota Fair Employment Practices Act*, 32 Minn. L. Rev. 349 (1948); *The New York State Commission Against Discrimination: A New Technique for an Old Problem*, 56 Yale L. J. 837, 846-8 (1947); 14 U. Pitt., L. Rev., *supra*, note 12, at 609-11; *Pennsylvania Fair Employment Practice Act*, 17 U. Pitt. L. Rev. 438, 442-4 (1956); *Employment Discrimination*, 5 R. R. L. R. 569, 572-575 (1960).

None of these laws contains any exemption for employers engaged in interstate commerce. They apply to "employers" generally. Exemptions are limited to employers of less than a specified number of employees and religious or other non-profit or distinctly private organizations. The various enforcement agencies have administered the laws without regard to whether the employers involved were engaged in interstate commerce. In addition, the laws have been widely applied to interstate carriers and only rarely has the issue of federal pre-emption been raised.¹³

13. In a few cases, the issue of pre-emption was raised before an enforcing agency but was not pressed. Aside from the present case, the only proceeding we know of in which the issue was raised in court is *Atchison, Topeka & Santa Fe R. Co. v. Fair Employment Practice Commission of the State of California*, 7 R. R. L. R. 164 (Los Angeles County, Superior Court, decided January 30, 1962). In that case, the State Commission had issued an order directing a railway company to cease discriminating against an em-

In the preparation of this brief, information on this point was sought from the state agencies charged with enforcement of the various state fair employment laws. Responses were received from eleven states, two of which, Indiana and Missouri, reported that they had handled no cases involving interstate carriers. The third, in California, reported only the case described in note 13 above. The following information was received from the remaining eight states.

The Kansas Commission on Civil Rights, since the adoption of the state law in 1961, has docketed one complaint against an interstate rail carrier. The railroad did not challenge the Commission's jurisdiction.¹⁴

The Massachusetts Commission Against Discrimination has prosecuted 92 complaints against seven interstate railroad companies, 18 complaints against 16 interstate trucking companies, and 12 complaints against nine interstate and international air lines.¹⁵

The Michigan Fair Employment Practices Commission has entertained complaints against an interstate bus company, an interstate railroad and Northwest Air Lines. The Northwest Air Lines complaint is docketed as Claim 598

ployee on the basis of race. The Superior Court set aside the Commission's order on the ground that it was not supported by the evidence. However, it first rejected the railway's contention that the Act could not constitutionally be applied to its operations. 7 R. R. L. R. at 165-166.

14. Letter of January 2, 1963 from Carl W. Glatt, Executive Director, Commission on Civil Rights. The letter also noted that, "In the eight years prior to July 1, 1961, under the unenforceable 1953 Kansas Act Against Discrimination, the Commission docketed three formal complaints against interstate carriers, all railroads."

15. Letter of December 27, 1962 from Walter H. Nolan, Executive Secretary, Massachusetts Commission Against Discrimination.

in the Commission's files. Northwest did not raise any question over the Commission's jurisdiction.¹⁶

The New York State Commission Against Discrimination has prosecuted the following cases among others. *Valentine v. Brotherhood of Railway and Steamship Clerks*, Lodge 56, 1952 Comm. Annual Report, p. 34; *Ruconich v. El Al Israel Air Lines*, 1953 Comm. Annual Report, p. 40; *Byams v. New York, New Haven & Hartford Railroad*, 1956 Comm. Annual Report, p. 57; *Inv. 831-59, Pan American World Airways*, 1960 Comm. Annual Report, p. 90; *Rosa Daly v. British Overseas Airways Corp.*, 1960 Comm. Annual Report, p. 91; *Patricia Banks v. Capital Air Lines*, 1960 Comm. Annual Report, p. 95.

The Oregon Bureau of Labor has entertained two complaints against an interstate air line.¹⁷

The Pennsylvania Human Relations Commission has exercised jurisdiction over seven complaints filed against several interstate air lines.¹⁸

The Washington State Board Against Discrimination has taken jurisdiction in 13 cases involving interstate carriers. Three were against the Northern Pacific Railroad, one was against the Great Northern Railway Company, six against United Air Lines, two against the Greyhound Bus Company, and the last was against an interstate trucking company.¹⁹

16. Information obtained from Edward N. Hodges, III, Executive Director, Michigan Fair Employment Practices Commission.

17. Letter of January 9, 1963 from Mark A. Smith, Administrator, Civil Rights Division, Oregon Bureau of Labor.

18. Letter of January 10, 1963 from Elliott M. Shirk, Executive Director, Pennsylvania Human Relations Commission. Mr. Shirk's letter notes that "our law prevents us from giving specific information as to name of complainant or respondent and case docket numbers."

19. Letter of January 9, 1963 from Malcolm B. Higgins, Executive Secretary, Washington State Board Against Discrimination.

The Wisconsin Fair Employment Practices Division of the Industrial Commission has entertained jurisdiction over several complaints against interstate railroads.²⁰

Congress has accepted application to interstate carriers not only of fair employment legislation but also of other laws prohibiting discrimination. These include laws dealing with discrimination against passengers—a matter directly affecting operation of individual carrier units.

No less than 28 states and the District of Columbia have enacted laws prohibiting discrimination by enterprises, variously defined, that solicit the patronage of the general public. The constitutionality of such laws is well-established.²¹

The first of these, which was enacted in Massachusetts in 1865, specifically applied to any "public conveyance."²² Of the 29 laws now in effect, 22 expressly apply to common carriers²³ and four are cast in terms broad enough to in-

20. Information obtained from Virginia Heubner, Director, Wisconsin Fair Employment Practices Division.

21. *District of Columbia v. John R. Thompson Co.*, 346 U. S. 100 (1953); *Darius v. Apostolos*, 68 Colo. 323, 190 Pac. 510 (1920); *Crosswith v. Bergin*, 95 Colo. 241, 35 P. 2d 848 (1934); *Baylies v. Curry*, 128 Ill. 287, 21 N. E. 595 (1889); *Pickett v. Kuchan*, 323 Ill. 138, 153 N. E. 667 (1926); *Bolden v. Grand Rapids Operating Corp.*, 239 Mich. 318, 214 N. W. 241 (1927); *Brown v. J. H. Bell Co.*, 146 Iowa 89, 123 N. W. 231 (1910); *Rhone v. Loomis*, 74 Minn. 200, 77 N. W. 31 (1898); *Marshall v. Kansas City*, 355 S. W. 2d 877 (Mo., 1962); *Messenger v. State*, 25 Neb. 674; 41 N. W. 638 (1889); *People v. King*, 110 N. Y. 414, 18 N. E. 245 (1888); *Commission v. George*, 61 Pa. Super. 412 (1915).

22. Gen. Stat. (1860-66 Supp.), Ch. 277.

23. *Alaska* Com. Laws, Sec. 20-1-3, "Transportation companies"; *Cal. Civ. Code*, Sec. 51, "Public conveyances and all other places of public accommodation or amusement"; *Colo. Rev. Stats.*, Sec. 25-2-3, "Public conveyances on land or water"; *Idaho* Gen. L. Ann. (1961 Supp.), Ch. 73, Sec. 18-7302(e), "Public conveyance

clude common carriers.²⁴ The remaining three appear to exclude interstate carriers.²⁵

or transportation on land, water or in the air, including the stations and terminals thereof and the garaging of vehicles"; *Ill. Stats. Ann.*, Ch. 38, Sec. 125, "Railroads, omnibuses, stages, street cars, boats, funeral hearses, and public conveyances on land and water"; *Ind. Stat. Ann.*, Sec. 10-901, "Public conveyances on land and water"; *Iowa Code*, Sec. 735.1, "Public conveyances"; *Maine Rev. Stats.*, Ch. 137, Sec. 50 (1954), "Public conveyances on land or water"; *Mass. Ann. Law*, Ch. 272, Sec. 92A, "A carrier, conveyance or elevator for the transportation of persons, whether operated on land, water or in the air, and the stations, terminals and facilities appurtenant thereto"; *Mich. Stats. Ann.*, Sec. 28.343, "Public conveyances on land and water"; *Minn. Stats. Ann.*, Sec. 327.09, "Public conveyances"; *Neb. Rev. Stats.*, Sec. 20-101 (1943), "Public conveyances"; *N. H. Rev. Stats. Ann.*, Ch. 354, Sec. 2, "Public conveyance on land or water"; *N. J. Stats. Ann.*, Sec. 10:1-5, "Any garage, any public conveyance operated on land or water and stations and terminals thereof"; *N. M. Stats. Ann.*, Sec. 49-8-5, "All public conveyances operated on land, water or in the air as well as the stations and terminals thereof"; *N. Y. Civ. Rights Law*, Sec. 40, "Garages, all public conveyances operated on land or water, as well as the stations and terminals thereof"; *N. D. Century Code Ann.* (1961 Supp.), Sec. 12-22-30, "Public conveyances"; *Ohio Rev. Code*, Sec. 2901, 35, "Public conveyance by air, land or water"; *Pa. Stats. Ann.*, Tit. 18, Sec. 4654 (1945), "Garages, and all public conveyances operated on land or water as well as the stations and terminals thereof"; *R. I. Gen. Laws*, Sec. 11-24-3, "All public conveyances, operated on land, water or in the air as well as the stations and terminals thereof"; *Wash. Rev. Code*, Sec. 49.60.040 (1956), "Public conveyance or transportation on land, water, or in the air, including the stations and terminals thereof and the garaging of vehicles"; *Wis. Stats. Ann.*, Sec. 942.04 (1956), "Public conveyances."

24. *Conn. Rev. Stat.*, Sec. 53-35, refers to "every place of public accommodation," and place of "public accommodation is defined as "any establishment * * * which caters or offers its services or facilities or goods to the general public * * *"; *Mont. Rev. Code*, Sec. 64-211 (1957 Supp.), "Public accommodation or amusement"; *Vt. Stats. Ann.*, Sec. 1451, "Any establishment which caters or offers its services or facilities or goods to the general public"; *Wyo. Stats. Ann.*, Sec. 6-83.1, "All accommodations * * * public in nature, or which invite the patronage of the public."

25. *D. C. Code* 33-604-607, applies only to eating places; *Kan. Gen. Stats. Ann.*, Sec. 21-2424 (1949), applies to any steamboat, railroad, stage coach, omnibus, streetcar, or any means of public carriage for persons or freight within the state; *Ore. Rev. Stats.*, Sec. 30.670.

B. No Federal statute precludes state regulation of this area.

The Colorado Supreme Court, in its decision in this case, did not consider the question of pre-emption but confined its decision to the argument, discussed in Points II and III below, that the challenged state law constituted a burden on interstate commerce. However, the trial court, whose decision the state Supreme Court commented on favorably, considered the pre-emption argument in detail and concluded that certain federal statutes indicated a clear Congressional intention to occupy the field of air transportation so completely as to exclude state regulation of any kind.

This argument has two aspects: first, that the Federal Government has specifically dealt with racial discrimination in employment by interstate air carriers, and, second, that, even if it has not, its regulation of such carriers is so extensive as to bar any state regulation even of matters not covered by federal statutes. We submit that neither argument is supported by the Decisions of this Court.

The trial court held that employment discrimination by interstate air carriers is prohibited by the Railway Labor Act (45 U. S. C. Sec. 151, *et seq.*, 181 *et seq.*) as well as the Civil Aeronautics Act. 49 U. S. C. Secs. 1301 *et seq.*, formerly 49 U. S. C. Secs. 401 *et seq.*

The Railway Labor Act and the decisions of this Court thereunder deal with discrimination by unions. *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U. S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768 (1952); *Conley v. Gibson*, 355 U. S. 41 (1957). No agency of the Federal Government administering the Railway Labor Act had suggested or taken any

action establishing that the statute deals with the discriminatory practice reached here under the Colorado law, i.e., discrimination by an employer independent of action by a union.

The provision in the Civil Aeronautics Act primarily relied on is 49 U. S. C. Sec. 1374(b) (formerly Sec. 484(b)), which provides as follows:

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The undersigned organizations do not, of course, take the position that this section cannot be invoked to prevent employment discrimination by air carriers. However, we are compelled to note that it has never been so interpreted or applied and its application to this area is at least an unresolved issue. This Court could hardly nullify application of the Colorado law to respondent on the ground of preemption without resolving that open question. Since there is at least doubt on this point, this Court, without resolving the issue, should uphold the state statute since, as this Court has repeatedly held, "Congress . . . will not be deemed to have intended to strike down a statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested." *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 766 (1945), and cases there cited.

If employment discrimination by interstate air carriers is not prohibited by federal legislation, the remaining question is whether Congress has so occupied the general field as to bar state regulation of that specific subject. We submit that the lower court's affirmative answer to that question is unsound. If it were sound, all state laws dealing in any way with air, railroad, motor or other forms of interstate transportation would be invalidated.

Surely, no aspect of our economy is so thoroughly regulated by Congress as the interstate railroads. Yet this Court has upheld even such detailed state regulation of rail operations as statutes requiring full crews on trains, *Chicago, R. I. & P. R. Co. v. Arkansas*, 219 U. S. 453 (1911); *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249 (1931). In referring to these statutes as an example of laws not barred by the Congressional power over interstate commerce, this Court has described them as "statutes dealing with employment of labor" (*Morgan v. Virginia*, 328 U. S. 373, 379n (1946)), a description plainly applicable to the statute here involved.

The courts below apparently believed that federal regulation of some aspects of interstate transportation by air precludes state regulation of all other aspects. Their error is revealed by this Court's decision in *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280 (1914), where a similar argument was rejected even within the narrow area of safety regulations. It was there argued that a state statute, based on safety considerations, regulating the strength of locomotive headlights was barred by federal laws "relating to power driving-wheel brakes for locomotives, grabirons, automatic couplers and height of drawbars," as well as a number of other statutes and regulations dealing with

safety (234 U. S. at 293). Justice (later Chief Justice) Hughes, speaking for a unanimous Court, disposed of this contention briefly, saying "But it is manifest that none of these acts provide regulations for locomotive headlights" (*ibid.*; emphasis supplied).

Finally, even if it appears that the Federal Government has regulated the very conduct here involved, that fact by itself would not be decisive. In *California v. Zook*, 336 U. S. 725 (1949), this Court expressly rejected the view that the mere fact of parallel federal and state regulation nullifies the latter. It held that there must be some additional showing of Congressional intent to exclude state action. Accordingly, the states have duplicated federal regulation in interstate transportation in a number of ways, one of which is revealed in the Colorado statute referred to in the decision below, which makes it a state crime to operate aircraft without the appropriate federal license and registration. Colo. Rev. Stat., Sec. 5-1-2. Although the court below cited this statute as showing state deferment to federal regulation, it actually shows concurrent regulation by the state and Federal Governments to enforce a common policy. D

We submit that the decisions of this Court establish that there is ample room for state regulation of employment discrimination by interstate air carriers. Nothing in the pre-emption doctrine requires the conclusion that Congress has barred state regulation of employment discrimination because it has found it necessary to regulate other unrelated aspects of air transportation.

II

The Colorado fair employment statute places no burden on interstate commerce.

Independent of the issue of pre-emption, it can be argued that the Colorado statute may not be applied to respondent if such application would be "burdensome . . . on interstate commerce" (*Huron case, supra*, 362 U. S. at 443). We submit that there is no basis for arguing, and that respondent has not shown, that a fair employment law places a burden on the employers to which it applies or that there is any danger that air carriers will be subjected to conflicting regulations.

A. The non-discrimination requirement places no burden on employers.

At the outset, it should be noted that a burden on interstate commerce will not be found lightly. In the cases in which this Court has held state laws unduly burdensome, there has been an impressive record spelling out the manner in which the statute made operation of the carriers' facilities more difficult or at least more expensive.

Thus, in *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945), this Court discussed in detail the effect of a state statute limiting the length of railroad trains (325 U. S. at 771-3). It noted that the statute had an "admittedly adverse effect on the operation of interstate trains" (*id.* at 764) and concluded that it placed a "serious burden" on railroad operations (*id.* at 773). See also *South Covington Ry. v. Covington*, 235 U. S. 537, 547 (1915); *Illinois Cent.*

R. Co. v. State of Illinois, 163 U. S. 142, 153 (1896); *Cleveland, etc. Ry. Co. v. People of State of Illinois*, 177 U. S. 514, 521 (1900); *Mississippi Railroad Comm. v. Illinois Central R. R. Co.*, 203 U. S. 335, 345, 346 (1906).

No such showing is made here. Respondent has not shown that compliance with the fair employment law would make the hiring of personnel more difficult. Plainly, it cannot, since the purpose and effect of such legislation is to remove a restraint on the employment process. Because of the law, respondent and all competing carriers have a larger source of manpower supply, free of artificial limitations based on race.

This is no longer a matter of speculation. As we have noted, fair employment laws have been in effect for more than 17 years. It is possible to consider their operation on the basis of actual experience. If they were burdensome to the employers affected, respondent would be able to produce evidence to that effect. It has not done so.

The fact is, on the contrary, that employers have operated freely and successfully in fair employment states. Many employers that have conformed to the requirements of the law have been outspoken in its support.

Early in 1950, *Business Week* asked employers in New Jersey, Connecticut and New York their views of the fair employment laws in their states. The magazine found that, while some employers still believed the laws unnecessary, even those employers who had opposed them were no longer actively hostile. All eleven firms surveyed reported to *Business Week* that the laws did not interfere with their right to hire the most competent employees they could find, and concluded that the laws were functioning without any serious problems. (*Business Week*, Feb. 25, 1950)

Even more favorable testimony was produced by the commission enforcing the New York State law in a statement to a Subcommittee of the United States Senate Committee on Labor and Public Welfare. (Statement of the New York State Commission Against Discrimination before the U. S. Senate Subcommittee on Labor and Labor Management Relations, April 16, 1952, pp. 11-12.) A "representative of an association of retail merchants" testified that the law had simple requirements that imposed no hardship upon an employer. A "financial district observer" noted that the law had had "a fine effect upon the employment practices of banks and brokerage houses * * *". A representative of a "public utility company" thanked the New York agency for its fair consideration of the company's employment practices and concluded that the agency's work had been of "definite value to us in appraising our personnel methods and practices."

The New York State Commission Against Discrimination (now called the New York State Commission for Human Rights) has also publicized statements from individual employers on the impact of the state anti-discrimination law upon them. The executive vice president of the New York Board of Trade said:

I am one of those who was against the anti-discrimination law when it was first introduced and worked hard to prevent its passage. Now after six years of operation particularly as it is so ably enforced, I find that our fears have not been realized, but much more genuine progress has been achieved.

The executive vice-president of the Commerce and Industry Association of New York State, in March 1953, said:

It is our observation that the New York State Anti-Discrimination program has in general functioned and has met with a wide degree of acceptance considering the sensitive area in which it operates. The State Commission Against Discrimination has approached its task with intelligence and there has been due emphasis on the role of education in effecting the purposes of the program. We are aware of no concerted employer opposition to the law and only spotty complaints have come to our attention. There are many illustrations of employer endorsement of and cooperation with the program.

The Rhode Island Commission for Fair Employment Practices has stated that many employers on the basis of their experience have been convinced of the groundlessness of their early fears of anti-discrimination laws and the Fair Employment Practices Commissions of Philadelphia and Minneapolis have also published reports confirming the view that employers believe now that fair employment practices acts have not only not burdened them but have in fact benefited them. (Reported in Staff Report to the Subcommittee on Labor and Labor Management Relations of the U. S. Senate, Committee Print, 82nd Cong., 2d Sess., p. 19 (1952). See also H. Rep. No. 1370, 87th Cong., 2d Sess., p. 5 (1962)).

B. There is no possibility of burdensome conflicting requirements.

Respondent argues, however, that its operations may be burdened by the Colorado law because it may be subjected to conflicting regulations in the various states in which it operates. In this connection, it relies on the well-established principle that state regulations may be found

to be unduly burdensome and hence unconstitutional if they result in inconsistency "in matters where uniformity is necessary * * *." *Morgan v. Virginia*, 328 U. S. 373, 377 (1946). That argument fails here because respondent cannot show either a possibility of inconsistency or a need for uniformity.

As we have noted above, fair employment laws applicable to common carriers are now in effect in 22 states. These states include 63.1% of the total population of the nation and most of its industrial areas.²⁶ More important, there are no state laws requiring discrimination; and it is now entirely clear that no state can constitutionally adopt a law requiring discrimination by private parties. See, e.g., *Buchanan v. Warley*, 245 U. S. 60 (1917); *Gayle v. Browder*, 352 U. S. 903 (1962), affirming 142 F. Supp. 707 (M. D., Ala., 1956).

Hence, this case does not reveal the vice that invalidated state regulation of interstate or foreign commerce in other cases, namely, that, if the regulations were sustained, other states could with equal right impose conflicting and diverse regulations that would burden interstate carriers. The Constitution itself, through the Equal Protection Clause, insures against a state requirement of discrimination in employment on account of race. The Colorado requirement of fair employment carries out the constitutional "pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 350 (1938). It cannot, therefore, be regarded as imposing an undue burden on interstate commerce.

26. The population of the twenty-two states in the 1960 census (The World Almanac, 1960, p. 255) was 113,232,789. The total United States population was 179,323,175.

Our contention that state regulation of interstate commerce may be held to be free of burdensome effects, in view of the restrictive effects of other provisions of the Constitution, is not new. The interplay between the Commerce Clause and the Fourteenth Amendment has been an important factor in sustaining state regulation of interstate commerce in the area of taxation. *McGoldrick v. Berwind-White Co.*, 309 U. S. 33 (1940); *International Harvester Co. v. Dept. of Treasury*, 322 U. S. 340 (1944); *Miller Bros. Co. v. Maryland*, 347 U. S. 340 (1954). In determining whether the validation of a state tax would subject interstate commerce to a risk of undue cumulative tax burdens, this Court has considered the effect of the Due Process Clause in restricting the taxing powers of other states. A basic consideration in the sustaining of certain state tax levies affecting interstate commerce has been the inability of other states to tax the same transaction, not because of the Commerce Clause, but because of the restrictions on extraterritorial taxation imposed on the states by the Due Process Clause.

This interrelation between the Commerce Clause and the Due Process Clause was illuminated in *International Harvester Co. v. Department of Treasury et al.*, *supra*; and *Freeman v. Hewit*, 329 U. S. 249 (1946). In the latter case, Justice Rutledge said (at p. 271):

Selection of a local incident for pegging the tax has two functions relevant to determination of its validity. One is to make plain that the state has sufficient factual connections with the transaction to comply with due process requirements. *The other is to act as a safeguard, to some extent, against repetition of the same or a similar tax by another state.* (Our emphasis; footnote omitted.)

See also McNamara, *Jurisdictional and Commerce Problems*, 8 Law and Contemporary Problems 482 (1941).

The principle applied in the tax cases affecting interstate commerce is, we believe, applicable to the instant case. In the cases referred to, the Due Process Clause made it impossible for other states to add to the burden of the tax on the transaction under attack, with the result that the levies were sustained. So, here, the Equal Protection Clause precludes diverse or conflicting state action respecting employment. Consequently, as in the tax cases, the regulation is valid, for in the absence of the risk of an undue burden on commerce, the statute is a proper exercise of the state's police power.

Finally, respondent has not shown that any burden will be placed on its operation by application of inconsistent laws regarding employment. The Colorado statute prohibits discrimination in employment and does not affect in any way the operation of respondent's planes. The contract of employment is made at one place and, of course, is subject to the law of that place and only that place. Once hired, an employee can be sent to any part of the country as respondent sees fit.

There is no need here, as there was in *Morgan, supra*, and in *Hall v. De Cuir*, 95 U. S. 485 (1877), for the carrier to make changes in its transportation units each time they cross a state line. There is no need for the crew of an interstate plane to interrupt a trip in order to comply with changed rules. In short, there is no burden, undue or otherwise.

Respondent and the court below placed their chief reliance on this Court's decisions in *Morgan* and *Hall*. We submit that those cases are clearly distinguishable since

they deal with operations rather than employment. There is a manifest difference, not discussed by the court below, between what happens day-to-day in the operation of planes and trains and what happens when a carrier takes on personnel at its home office. In one case, conflicting regulations directly affect the operation of the transportation units; they compel extra work on the part of the operating crews and sometimes the use of extra equipment and the halting of trips at state lines. No such problems are posed by inconsistent regulation of employment; no other problems are plausibly suggested. No showing has or can be made of the "transportation difficulties" that were decisive in *Morgan*. 328 U. S. at 385-6.

Respondent has tried to make the rulings in *Morgan* and *Hall* fit a situation to which they have no logical application. It has attempted to create the impression that those cases dealt generally with the whole problem of racial discrimination in interstate transportation in all its forms. In fact, however, they dealt at most with the handling of passengers in interstate transportation units. Neither their rationale nor their factual basis applies to the hiring of employees.

Moreover, in *Morgan*, there was not only the possibility but the actual fact of inconsistent regulations, as this Court took pains to show (328 U. S. at 381-383). The possibility of inconsistent regulations also existed in the *Hall* case at the time it was decided. But whatever validity *Hall* may have had up to 1954, it is now completely undermined by the decisions of this Court condemning state segregation laws, as we have shown above. We therefore respectfully suggest that this case provides an appropriate occasion for overruling *Hall* expressly, at least to the extent that it

holds that a law prohibiting discrimination may obstruct interstate commerce. There is no basis in law or practical experience for a holding that a law requiring equal treatment is burdensome. Such a holding, we believe, is fundamentally at odds with the equalitarian concepts of the Constitution. It might as well be argued that "the mandates of liberty and equality that bind officials everywhere" (*Nixon v. Condon*, 286 U. S. 73, 88 (1932)) place a "burden" on government—that the prohibition of racial segregation in public schools is a "burden" on education.

Since the rationale of *Hall v. DeCuir* has been destroyed, it is time that the ambiguity caused by its continuing vitality be eliminated by this Court.

III

Accommodation of the competing demands of the state and national interests requires a decision upholding the validity of the Colorado statute.

If it is assumed, contrary to what was said in the previous point, that the Colorado fair employment law does place some burden on interstate commerce, the national interest in the elimination of that burden must be weighed against the state interest sought to be served by the statute. Thus, in *Southern Pacific, supra*, this Court measured "the relative weights of the state and national interests. . . ." (325 U. S. at 770). As already noted, it found first that the challenged state law placed a substantial, palpable burden on interstate carriers. It then went on to consider in detail the evidence relevant to the state need served by the statute and found that the statute, "viewed as a safety measure, affords at most slight and dubious advantage. . . ." (325

U. S. at 779). The public purpose served by the Colorado fair employment law, we submit, is far more substantial.

Both the existence and the harmful effects of discrimination in employment against minority groups have been fully documented. See, e.g., Myrdal, *An American Dilemma*, Chaps. 9-19 (1944); Weaver, *Negro Labor, A National Problem*, pp. 16-97 (1946); Emerson & Haber, *Political and Civil Rights in the United States*, Vol. II, pp. 1422-5 (1958). The first wartime executive order dealing with discrimination by defense contractors, issued by President Roosevelt in 1941, found that "available and needed workers have been barred from employment in industries engaged in defense production solely because of consideration of race, creed, color, or national origin, to the detriment of workers' morale and of national unity." Executive Order No. 8802, 6 Fed. Reg. 3109 (1941). The Fair Employment Practice Committee established under that order found extensive evidence of discrimination. Fair Employment Practice Committee, *First Report*, pp. 85-101 (1945); *Final Report*, pp. 41-97 (1947).

It was also during the period of World War II that the New York State Legislature established a Temporary Commission Against Discrimination, headed by State Senator Irving M. Ives, later a United States Senator, to investigate this pressing problem. On the basis of extended hearings, the Temporary Commission reached the following conclusion (*Report*, Legislative Document (1945) No. 6, at pp. 48-49):

Discrimination in opportunity for employment is the most injurious and un-American of all the forms of discrimination. To deprive any person of the chance to make a living is to violate one of the most fundamental of human rights. Moreover, such discrimination is op-

posed to every sound principle of public policy and makes against loyalty to democratic institutions. * * * Social injustice always balances its books with red ink.

Accordingly, the Commission recommended the adoption of a state law prohibiting discrimination in employment and the establishment of an administrative agency to enforce its provisions. In the same year that the Commission issued its Report, the New York State Legislature adopted its fair employment law, based on the proposed bill submitted by the Temporary Commission (Report, pp. 77-82). The Legislature expressly found, in that statute, that "practices of discrimination * * * because of race, creed, color or national origin are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundations of a free democratic state." New York Exec. Law, Sec. 290.

Similar findings have been made by many of the other states that have adopted fair employment legislation.²⁷ In one of the most recent statutes, the Illinois Legislature found that " * * * denial of equal employment opportunity because of race, color, religion, national origin or ancestry with consequent failure to utilize the productive capacities of individuals to the fullest extent deprives a portion of the population of the State of earnings necessary to maintain a reasonable standard of living, thereby tending to cause resort to public charity and may cause conflicts and controversies, resulting in grave injury to the public safety, health and welfare."

27. See the Alaska, California, Kansas, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Washington and Wisconsin statutes cited in notes 1 to 9, *supra*.

Federal government agencies have reached the same conclusion. The President's Committee on Civil Rights found extensive evidence of discrimination in employment and its evil effects in its 1947 Report, *To Secure These Rights*, pp. 53-62 (1947). Thirteen years later, the United States Commission on Civil Rights issued a 246-page report dealing with this problem. *1961 Report, Book 3, "Employment."*

The widespread existence of employment discrimination has also been found by Congressional committees studying the subject. Sen. Rep. No. 2,080, 82nd Cong. 2d Sess., pp. 3-4 (1952); H. Rep. No. 1,165, 81st Cong. 1st Sess., pp. 2-8 (1949); H. Rep. No. 951, 80th Cong. 2d Sess., pp. 2-6 (1948); Sen. Rep. No. 290, 79th Cong. 1st Sess., p. 3 (1945); Sen. Rep. No. 1,109, 79th Cong. 1st Sess., pp. 2-3 (1945). Most recently, the House Committee on Education and Labor, in a report on a proposed federal fair employment law, stated (H. Rep. No. 1370, 87th Cong. 2d Sess. pp. 1, 2 (1962)):

The conclusion inescapably to be drawn from 98 witnesses in 12 days of hearings, held in various sections of the country as well as in Washington, and from many statements filed without oral testimony, is that in all likelihood fully 50 percent of the people of the United States in search of employment suffer some kind of job opportunity discrimination because of their race, religion, color, national origin, ancestry, or age. It should be made clear that the evidence poured in from all parts of the Nation—East, West, North, and South. . . .

Arbitrary denial of equal employment opportunity unquestionably contributes to our current staggering welfare assistance costs . . .

Fair employment legislation of the kind adopted in Colorado is a reasonable and effective way of dealing with this well-documented evil. In state after state that has adopted such legislation, its beneficial effect has been realized. Thus, in ten of the states having a number of years of experience with fair employment laws, the State Advisory Committees to the United States Commission on Civil Rights reported in 1961 that beneficial effects had been achieved. United States Civil Rights Commission, *Fifty States Report*, pp. 56, 80, 287, 297, 405-8, 429-31, 530, 545, 556-7, 631-4 (1961). See also Konvitz and Leskes, *A Century of Civil Rights*, pp. 222-224 (1961).

We submit that the Colorado Legislature could reasonably conclude that employment discrimination based on race, religion and national origin exists, that it has harmful effects of the kind normally dealt with under the police power and that the legislation here challenged was a reasonable and effective method of dealing with it. Hence, the "state interest" is substantial. The "national interest", in barring state laws prohibiting employment discrimination by interstate carriers, as we have seen, is at best minimal and, in fact, we believe, non-existent. Indeed, constitutional principles as well as practical considerations compel the conclusion that the national interest is advanced rather than hindered by elimination of discrimination by interstate air carriers. There is therefore no basis for holding that preservation of the federal-state relationship requires the result reached below.

Conclusion

Fair employment laws are a conventional and widely accepted exercise of the police power of the states. They have been applied to interstate carriers for over a decade without hampering interstate transportation. No national interest, no constitutional principle, no decision of this Court requires that Continental Air Lines be given a license to operate in defiance of the declared policy of Colorado, under which the state has "put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt." Frankfurter, J., concurring in *Railway Mail Association v. Corsi*, *supra*, 326 U. S. at 98. The decision of the Colorado Supreme Court should therefore be reversed.

Respectfully submitted,

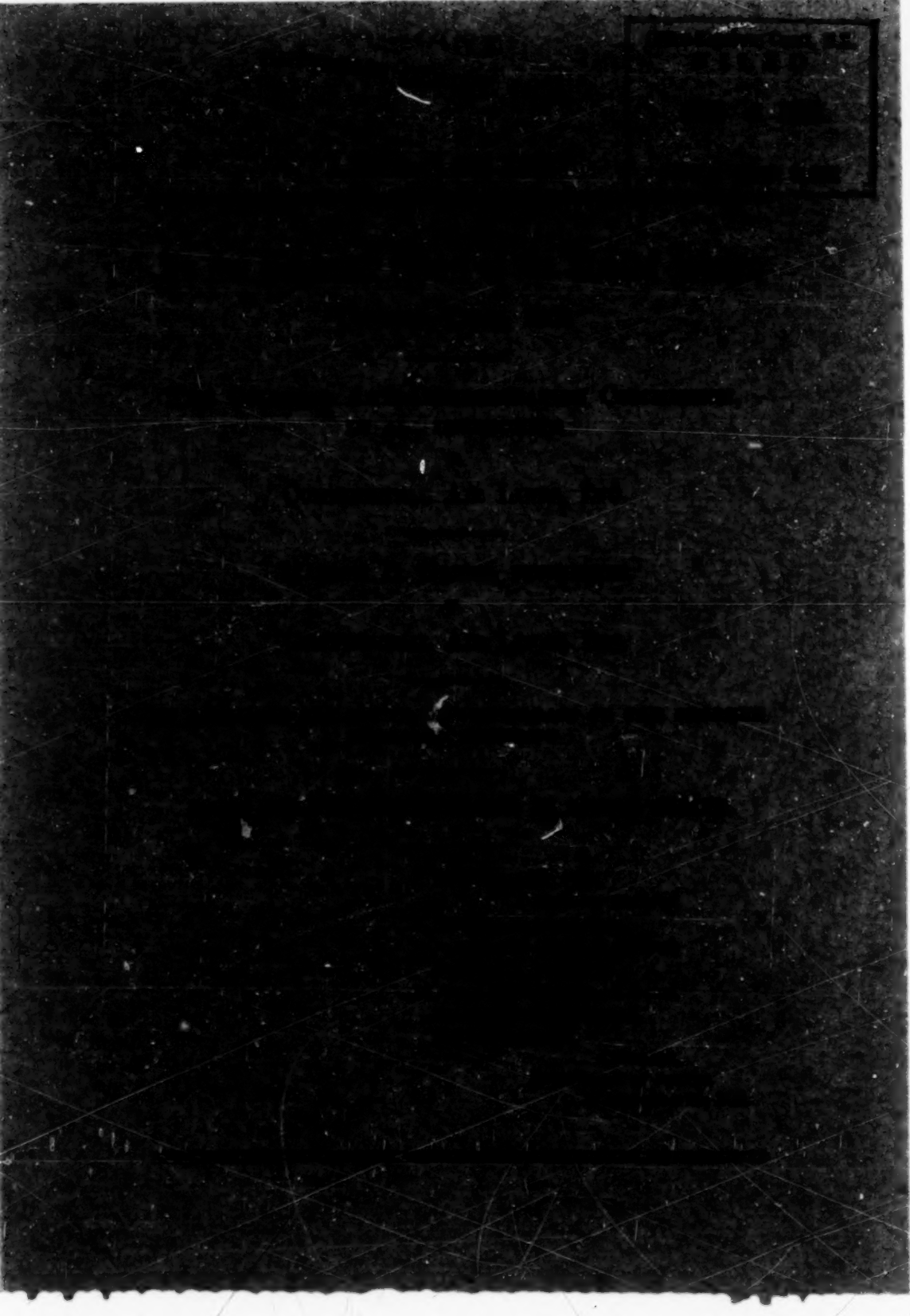
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 146

**THE COLORADO ANTI-DISCRIMINATION COMMISSION,
ET AL., PETITIONERS**

v.

CONTINENTAL AIR LINES, INC.

No. 492

MARLON D. GREEN, PETITIONER

v.

CONTINENTAL AIR LINES, INC.

**ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME
COURT OF COLORADO**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the District Court of the City and County of Denver (R. 257-286) is unreported. The opinion of the Supreme Court of Colorado (R. 288-309) is reported at 368 P. 2d 970.

(1)

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on February 13, 1962 (R. 310). Petitions for rehearing, filed by both petitioners, were denied on March 5, 1962 (R. 314). Petitioners Green and the Colorado Anti-Discrimination Commission filed petitions for writs of certiorari on April 30, 1962, and May 26, 1962, respectively. On October 8, 1962, this Court granted both petitions (R. 314-315). The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the Colorado Anti-Discrimination Act, which forbids racially discriminatory employment practices and establishes a commission with power to enforce the Act, may be applied, consistently with the commerce clause, to the hiring practices of an interstate air carrier, where the hiring in question is conducted solely within the State of Colorado.

2. Whether such application of the Colorado Act is preempted by federal legislation dealing with air commerce, the Railway Labor Act, or federal executive orders relating to discrimination by contractors who deal with the federal government.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant constitutional provisions, federal and Colorado statutes, and federal regulations are set forth in the Appendix, *infra*, pp. 58-62.

INTEREST OF THE UNITED STATES

The specific issue in this case is whether a State, through an anti-discrimination commission, has the power to prohibit discrimination by an air carrier between applicants for the position of pilot solely on the basis of race. Stated generally, this case involves the power of the States to prohibit racial discrimination in the hiring of persons to fill thousands of jobs on planes, railroad trains, trucks, buses, and ships which move in interstate commerce.

Discrimination against Negroes in employment is widespread, particularly when they seek skilled positions like that of a pilot. The result is not merely to deny countless Negro citizens equal opportunity to earn a livelihood. In addition, "The waste of human resources resulting from the lack of needed skills is a serious obstacle to full realization of the Nation's capabilities." 1961 United States Commission on Civil Rights Report, *Employment*, p. 2.

The national policy of the United States is strongly opposed to racial discrimination in employment. In Executive Order 10925, 26 Fed. Reg. 1977 (March 6, 1961), establishing the President's Committee on Equal Employment Opportunity, President Kennedy declared that it was "in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower." The national policy against employment discrimination would not be served by the significant reduction in the permissible scope of state anti-discrimination laws which would result if the judgment

below were sustained. The United States further wishes to express its views on the question whether, as the court below found, the channels of interstate commerce would be unreasonably burdened if the application of the state anti-discrimination statute to this case were upheld.

STATEMENT

Petitioner Marlon D. Green, a captain in the United States Air Force (R. 34) and a rated pilot since 1951 (R. 28, 223), decided to leave the Air Force in 1957 in order to seek employment as a commercial airline pilot (R. 34). Upon his discharge, Captain Green had logged 3,071 hours of flying time (R. 32, 224), many in difficult air-sea rescue service (R. 183). He traveled to California, Denver, Chicago, New York, and Washington, D.C., to obtain a pilot's position but was unsuccessful (R. 183).

In August 1957, Green filed a complaint with the Colorado Anti-Discrimination Commission (the other petitioner, hereinafter referred to as the "Commission") (R. 1). The complaint alleged that respondent Continental Air Lines, Inc., a commercial airline with headquarters in Denver, had violated the Colorado Anti-Discrimination Act of 1957 (1953 Colo. Rev. Stat. (Perm. Supp. 1960) §§ 80-24-1 to 80-24-8) (1) by refusing, on or about July 8, 1957, to employ Green as a commercial airline pilot because he is a Negro; (2) by failing to advise Green as to the action taken on his employment application within a specified period of time, as it had promised, and (3) by requiring, on its employment application form, desig-

nation of the applicant's race and attachment of a photograph (R. 1).

The "Coordinator" of the Commission (the Commission's investigating official) determined that probable cause existed for believing the allegations of the complaint, and, pursuant to the Commission's direction, attempted to dispose of the complaint by informal methods of conference, conciliation, and persuasion. Ultimately, however, he reported to the Commission that further effort would be futile. The Commission thereupon ordered a hearing and directed Continental to answer the charges of the complaint (R. 2-3).

Continental's answer admitted that it was a "commercial carrier by air and that it maintains an office at Stapleton Airfield, Denver, Colorado," but denied that it had violated the Act (R. 4). Continental further asserted, *inter alia*, that it was "engaged in the interstate transportation of passengers and freight by air by virtue of and subject to the laws, statutes and regulations of the United States applicable to interstate commercial carriers by air, including the Civil Aeronautics Act of 1938, as amended (49 U.S.C.A. §§ 401 *et seq.*) and the Railway Labor Act, as amended (45 U.S.C.A. §§ 151 *et seq.*)," and that "[b]y such laws, statutes and regulations the United States has pre-empted and reserved to its exclusive jurisdiction the regulation and control of interstate commercial carriers by air pursuant to the provisions of Article I, Section 8 of the Constitution of the United States" (R. 6). The answer requested the Commission to dismiss the complaint for lack of jurisdiction over the subject matter (R. 6).

At the hearing before the Commission, Continental's Vice President for Personnel (R. 96) testified that Continental operates in eight States, including Colorado (R. 109).¹ He testified further that Continental employs approximately 220 pilots, 90 to 95 of whom are "based in Denver"; that approximately 800 of its employees are stationed in Denver (R. 109); that Continental's "employment operation" was "conducted approximately three and a half miles away from the [Denver] airport" (R. 98); that an applicant for the position of pilot is interviewed and given "a link check" and a flight check" in Denver (R. 99); and that, in 1957, Continental selected approximately 35 pilots from approximately 178 brought to Denver to be interviewed (R. 102). The testimony also showed that Continental had asked Green to report to Denver for an employment interview (R. 38), and that Green had reported to Continental's office at the Denver Airport where he was given a link check and a flight check (R. 39, 44).

On December 19, 1958, after extensive hearings, the Commission entered "Findings Of Fact, Conclusions Of Law And Orders," signed by the Coordinator (R. 223). The Commission assumed the constitutionality of the Anti-Discrimination Act and determined that it had jurisdiction to hear the complaint. The Commission found that Continental was guilty of a discriminatory and unfair employ-

¹ Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois, and California (R. 109).

² A "link check" is a test of an applicant's skill under simulated flight conditions (R. 39).

ment practice in requiring that the race of the applicant be shown on the application form and that a photograph be attached to the application (R. 224). It further found that Green "had more flying hours than any other applicant and was better qualified for the position of co-pilot than any applicant interviewed, but was not hired because of the discriminatory act of Respondent" (R. 225), and that "the only reason that * * * [Green] was not selected for the training school was because of his race" (R. 225). The Commission therefore ordered Continental to cease and desist from the discriminatory and unfair employment practice and to give Green the first opportunity to enroll in its next course in the training school. Green was given until January 10, 1959, to indicate his willingness to enter the next pilot training course (R. 226). On December 31, 1958, Green notified the Commission of his intention to enroll in the next course (R. 226), and on January 7, 1959, the Commission entered an order notifying Continental of Green's decision (R. 226).

On February 3, 1959, Continental filed a petition for review of the Commission's order in the District Court of the City and County of Denver (R. 227). Considerable litigation followed, including a remand for further findings which were supplied by a stipulation that (R. 256):

Continental * * * was engaged in business as a commercial carrier by air of passengers, freight, and United States mail pursuant to a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board. Conti-

• nental is qualified to do business in the state of Colorado where its principal offices are located.

(b) Continental conducted its business in and between the states of Colorado, New Mexico, Texas, Oklahoma, Kansas, Missouri, Illinois and California. By reason thereof Continental was engaged in interstate commerce among said states.

On January 7, 1961, after hearing argument, the Denver district court entered findings of fact, conclusions of law, and judgment (R. 257). The court concluded that the Colorado Anti-Discrimination Act "may not constitutionally be extended to cover the flight crew personnel of an interstate air carrier" (R. 285) because such application of the Act (1) would unconstitutionally burden interstate commerce (R. 260-273), and (2) would be preempted by the Railway Labor Act (R. 274-277), the Civil Aeronautics Act of 1938 (R. 277-283), and federal executive orders dealing with discrimination by employers contracting with the federal government (R. 283-284). With respect to the executive order, the court stated that "[a]s a certificated commercial carrier by air, [Continental] is obligated to and in fact does transport United States mail under contract with the United States Government" and that "[t]herefore, Continental remains constantly in the status of one contracting with the federal government and subject to the nondiscrimination policy required of such contractors" (R. 284). Accordingly, the court set aside the determination of the Commission and dismissed petitioner Green's complaint.

Upon appeal, the Supreme Court of Colorado, in a 4 to 3 decision, affirmed. It held that "[r]acial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (citing *Hall v. DeCuir*, 95 U.S. 485, and *Morgan v. Virginia*, 328 U.S. 373) (R. 294).³

SUMMARY OF ARGUMENT

I

A. The commerce clause does not, of its own force, prohibit state regulation affecting interstate commerce unless the State places a burden on such commerce or the subject requires uniformity. *E.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770. Consequently, this Court has sustained many state laws affecting commerce in the absence of Congressional action. For example, a State may examine and license trainmen engaged in interstate commerce to ensure their fitness and skill (*Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama*, 128 U.S. 96; *Smith v. Alabama*, 124 U.S. 465), require a minimum crew to move trains (*Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453), and prescribe regulations for the payment of their wages (*Erie R. Co. v. Williams*, 233 U.S. 685).

³ The decision of the Supreme Court of Colorado has been the subject of uniformly adverse comment in legal periodicals. See Comment, 76 Harv. L. Rev. 404 (1962); Comment, 62 Col. L. Rev. 1348 (1962); Comment, 110 Pa. L. Rev. 1033 (1962); Comment, 48 Va. L. Rev. 1149 (1962); Note, *Employment Discrimination and Interstate Carriers*, 37 Ind. L.J. 490 (1962).

B. The Colorado Anti-Discrimination Act does not burden interstate commerce through diversity of local regulation. In holding that "[r]acial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States," the Colorado Supreme Court relied upon *Hall v. De Cuir*, 95 U.S. 485, and *Morgan v. Virginia*, 328 U.S. 373. But in those cases, far from holding the regulation relating to racial discrimination invalid *per se*, the Court determined from the particular circumstances whether unreasonable obstacles to the flow of commerce would result from allowing the state law to stand. The statutes in the *Hall* and *Morgan* cases dealt with segregation of interstate passengers, and were held unconstitutional because, in conjunction with the laws of sister States, they required, or would likely have required, the rearrangement of passengers when state lines were crossed. Where the Court could find no interference with the flow of commerce, a state regulation relating to racial discrimination was sustained. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 39.

Application of state fair employment practices' acts to hirings by interstate carriers creates no real threat of a burdensome diversity of regulation impeding the flow of interstate commerce. First, hiring is essentially local in nature, completed before interstate movement is begun. Second, the Fourteenth Amendment greatly minimizes, if it does not eliminate, the risk of conflicting state regulation since any

state law requiring discrimination would be plainly unconstitutional. Nor is there the threat of conflict between state and national policies, since the national policy—established by the Constitution and confirmed by Congress and the executive branch in many statutes and regulations—is firmly opposed to racial discrimination.

C. The Colorado Act does not otherwise impede the free flow of commerce. There is no evidence that the Act, either on its face or as applied, discriminates against interstate commerce. Nor does the Act impose substantial economic disabilities on interstate carriers. The statute's sole requirement is that, if the carrier elects to hire in Colorado, all applicants for employment shall be treated alike, regardless of their race or color. In the full train crew cases, this Court held that a State may require an interstate carrier to hire a specified number of employees because of the State's interest in the safety of railroad operations. *E.g., Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453. As a result, carriers were forced to hire what they considered to be an excessive number of employees. *A fortiori*, a State does not unduly burden commerce by requiring an air carrier, in the interest of the public welfare of the State, to hire the pilot best qualified for a position which the carrier admittedly wants filled. Such a requirement, far from hindering interstate commerce, facilitates its free flow by requiring airlines to hire pilots on the basis of their qualifications, and not on the basis of irrelevant and invidious considerations.

II

This Court has repeatedly held that the police powers of the State are not superseded by federal statutes unless preemption was "the clear and manifest purpose of Congress." *E.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. No federal statute or regulation prevents the application of state laws prohibiting discrimination in employment to hiring by interstate carriers.

A. The Civil Aeronautics Act (now the Federal Aviation Act), while conferring broad powers on the Civil Aeronautics Board to regulate the air transportation industry, did not remove all the activities of interstate air carriers from the reach of state law. Since employment relations were not covered by the Act at all, with the possible exception of two provisions, they were susceptible of state regulation in ways not interfering with Board jurisdiction. The two exceptions were provisions prohibiting discrimination generally which may possibly have prohibited racial discrimination in hiring. If they did, this merely means that the state unemployment acts and the Civil Aeronautics Act had the same objective. This Court has frequently sustained parallel state and federal regulation.

The circumstances of this case show no basis for finding preemption:

1. The federal regulation, if any, of discrimination in employment by air carriers was not so comprehensive as to suggest that Congress intended to be definitive. It is scarcely believable that the short and incidental references to discrimination in employment in

the Civil Aeronautics Act could be intended to oust the States of jurisdiction.

2. There is no substantial danger that coincidental state regulation would interfere with the effectuation of the federal policy either by upsetting the balance of federal rights and duties or by hampering the operation of the federal agency. Thus, this case is very unlike the preemption cases which have arisen in the complex field of labor-management relations.

3. The federal interest in preserving equal opportunity in employment is not so preeminent nor the need for uniformity so great as to indicate that Congress must have intended to establish an exclusive rule.

4. The authority of the Board over racial discrimination in hiring, if it exists, has never been exercised. The bare existence of uncertain and unexercised administrative authority does not normally preclude state regulation.

B. While certain provisions of the Railway Labor Act apply to air carriers, these provisions, like the entire Act, deal only with union organization and collective bargaining between the carriers and their employees. The Colorado Anti-Discrimination Act deals with an entirely different segment of employer-employee relations—the promotion of equal opportunity in employment regardless of race, creed, or color.

C. Federal executive orders require that all contracts with the federal government include a clause prohibiting racial discrimination in hiring in connection with the contract. While respondent carries mail, it does so under 49 U.S.C. 1375; it did not enter

into a contract with the government, with or without a non-discrimination clause. Even if there had been such a contract, there is no basis for concluding that the federal government, in promulgating executive orders against discrimination, intended to permit companies to utilize federal contracts as a means of avoiding existing state prohibitions of racial discrimination. Experience has shown that federal-state co-operation in this area has been mutually beneficial.

ARGUMENT

INTRODUCTION

Discrimination in employment on the basis of race is a major national problem. All too often Negroes, even when equally or better qualified than whites, are refused employment. This situation is particularly acute with regard to employment in skilled and professional occupations. The result is that Negroes are denied, in significant measure, the economic opportunities which Americans regard as essential in a free society. The nation as a whole is seriously injured by the practice, economically as well as spiritually, for our increasingly complex economy requires the services of all skilled and professional workers. See 1961 United States Commission on Civil Rights Report, *Employment*, pp. 1-2.

Broad legislation prohibiting racial discrimination in employment practices and providing administrative bodies with enforcement powers has been enacted in eighteen States (including Colorado) since

1945, when New York passed the Ives-Quinn Act.⁴ Many of these statutes have been applied by the States to interstate carriers. See Brief of the American Jewish Congress, *et al.*, as *amicus curiae*, pp. 10-12. Seven other States have enacted some legislation relating to employment discrimination.⁵ These statutes were designed to promote the public welfare, and respondent does not question that they constitute a valid exercise of the States' police powers. Compare *Railway Mail Ass'n v. Corsi*, 326 U.S. 88; *District of Columbia v. Thompson*, 346 U.S. 100, 110; *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28.

Moreover, these statutes are fully consistent with, indeed they implement, the fundamental national policy of equal treatment of all citizens, regardless of

⁴ Alaska Comp. Laws Ann. §§ 43-5-1 to 43-5-10 (Supp. 1958); Cal. Labor Code §§ 1410-1432 (Supp. 1962); Colo. Rev. Stat., 1953, §§ 80-24-1 to 80-24-8 (Perm. Supp. 1960); Conn. Gen. Stat. (Rev. 1958) §§ 31-122 to 31-128; Del. Code Ann., Tit. 19, §§ 710-713 (Supp. 1960); Mass. Ann. Laws, ch. 151B, §§ 1-10 (1957); Mich. Stat. Ann. §§ 17.458(1)-17.458(11) (1960); Minn. Stat. Ann. §§ 363.01-363.13 (1957); N.J. Stat. Ann. §§ 18:25-1 to 18:25-28 (Supp. 1962); N.M. Stat. Ann. §§ 59-4-1 to 59-4-14 (1953); N.Y. Executive Laws §§ 290-301 (1951); Ohio Rev. Code Ann. §§ 4112.01-4112.99 (Page Supp. 1962); Ore. Rev. Stat. 659.010-659.990 (1961); Pa. Stat. Ann., Tit. 43, §§ 951-963 (Supp. 1961); R.I. Gen. Laws Ann. §§ 28-5-1 to 28-5-39 (1956); Wash. Rev. Code Ann. §§ 49.60.010-49.60.320 (1962); Wis. Stat. Ann. §§ 111.31-111.38 (Supp. 1962).

⁵ Ariz. Rev. Stat. §§ 23-371 to 23-375 (1956); Ill. Ann. Stat. ch. 29, §§ 17-24g, ch. 127, §§ 214.1-214.5 (Smith-Hurd 1953, as amended, Supp. 1962); Ind. Ann. Stat. §§ 40-2307 to 40-2317 (Burns Supp. 1962); Iowa Senate Concurrent Resolution 15, April 25, 1955, CCH Lab. L. Rep., 1 State Laws, § 47,500; Kan. Gen. Stat. §§ 44-1001 to 44-1014 (G.S. Supp. 1961); Neb. Rev. Stat. §§ 48.215-48.216 (1960); Nev. Rev. Stat. § 338.125 (1959).

race, creed, or color. This broad policy reflected in the Fourteenth and Fifteenth Amendments and in numerous federal statutes has been specifically applied by the Chief Executive to employment. Executive Order 10925, issued by President Kennedy on March 6, 1961, states that "discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States * * *," establishes the President's Committee on Equal Employment Opportunity, and charges it with meeting the "urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity." 26 Fed. Reg. 1977.

The sole issue is whether the State is precluded from dealing with racial discrimination in the circumstances of this case, involving an interstate carrier, even though it may prohibit racial discrimination in hiring generally. The Colorado courts held that the Colorado Anti-Discrimination Act could not be applied to hiring by an interstate carrier within Colorado because such application was barred by the commerce clause and by federal legislation and regulations which have occupied the field. Similar state air carriers (*e.g.*, *Jeanpierre v. Arbury*, 3 App. Div. 2d 514, 162 N.Y.S. 2d 506; *Banks v. Capital Airlines*, 5 Race Rel. L. Rep. 263 (N.Y. State Commission Against Discrimination, February 29, 1960)) and to other employers engaged in interstate and foreign commerce (*American Jewish Congress v. Carter*, 23 Misc. 2d 446, 190 N.Y.S. 2d 218, modified *per curiam*, 10 App. Div. 2d 833, 199 N.Y.S. 2d 157,

affirmed, 9 N.Y. 2d 223, 173 N.E. 2d 788, 213 N.Y.S. 2d 60 (state anti-discrimination law applied to firm engaged in foreign commerce)). The effect of the decision below, if it were sustained, would be to prevent the application of state anti-discrimination statutes to the millions of jobs provided by interstate carriers or, at the least, to the many thousands of jobs which require the employee himself to travel in interstate commerce.

In our view, the holdings of the Colorado courts were erroneous. We submit that the States, acting consistently with the national policy, have the power to prohibit all racial discrimination in hiring which is conducted within their territory and, more particularly, that they may prohibit such discrimination by interstate carriers. We see no conflict in the application of state anti-discrimination legislation to interstate carriers, either from the standpoint of the inherent power of Congress under the commerce clause or from the standpoint of any federal statute or regulation.

I

THE COLORADO ANTI-DISCRIMINATION ACT, AS APPLIED TO
THE HIRING OF EMPLOYEES BY AN INTERSTATE CARRIER
WITHIN COLORADO, IS CONSISTENT WITH THE COM-
MERCE CLAUSE

A. THE COMMERCE CLAUSE DOES NOT PROHIBIT STATE REGULATION
AFFECTING INTERSTATE COMMERCE UNLESS IT BURDENS SUCH
COMMERCE OR THE SUBJECT REQUIRES UNIFORMITY

The Constitution grants to Congress the power to "regulate Commerce * * * among the several

States,"* but it neither expressly excludes nor reserves a concurrent power in the States. At first it was thought that the power to regulate interstate commerce resided exclusively in the Congress, and that all state regulation was impliedly prohibited whether or not Congress had acted. *Gibbons v. Ogden*, 9 Wheat. 1. A few years later, however, in a landmark opinion, the Court laid down the rule which still applies today: "Whatever subjects of [the commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 319. On the other hand, the Court held that the States may legislate concerning subjects covered by the commerce clause—such as the use of local harbor pilots—which do not require uniform regulation. It is now well settled that in the latter situation a state statute does not fall merely because it may be regarded as "regulating" interstate commerce; instead,

* U.S. Const., Art. I, § 8, cl. 3. See generally Note, *Discrimination and the Commerce Clause*, 58 Yale L.J. 329 (1949); Ribble, *State and National Power over Commerce* (1937); Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (1937); Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1 (1940); Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Col. L. Rev. 547 (1947); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 Vand. L. Rev. 446 (1951); Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harv. L. Rev. 645, 883 (1946); Dunham, *Congress, The States and Commerce*, 3 J. Pub. L. 47 (1959).

such regulation is upheld so long as it does not constitute a burden on interstate commerce. *E.g., Stone v. Farmer's Loan & Trust Co.*, 116 U.S. 307, 334; *Smith v. Alabama*, 124 U.S. 465, 473-474; *Illinois Central Railroad Co. v. Illinois*, 163 U.S. 142; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770; *Morgan v. Virginia*, 328 U.S. 373, 380. In short, as the Court stated in *Southern Pacific*, "[t]here has thus been left to the states wide scope for the regulation of matters of local state concern, even though it in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern." 325 U.S. at 770.

In applying this rule, the Court has made an "accommodation of the competing demands of the state and national interests involved." *Parker v. Brown*, 317 U.S. 341, 362. As a result, the States may pass regulatory legislation even though it has an impact on interstate commerce and interstate carriers, when the matter being regulated is of local concern and presents no threat of burdensome diversity of treatment. *Id.* at 359-360; *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767; *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-444; *Cities Service Co. v. Peerless Co.*, 340 U.S. 179, 186; *California v. Thompson*, 313 U.S. 109, 113-114; *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346; *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 117, 185-191; *The Minnesota Rate Cases*, 230 U.S. 352, 402-

412. Thus, interstate carriers, including air carriers, are subject to state law for torts occurring within the limits of the State. *Minnesota Rate Cases*, 230 U.S. 352, 408; *Prentiss v. National Airlines*, 112 F. Supp. 306 (D. N.J.); *Adler's Quality Bakery, Inc. v. Gasteria, Inc.*, 32 N.J. 55, 159 A. 2d 97. The States may promulgate reasonable health and safety laws governing the operation of vessels (*Huron Cement Co. v. Detroit*, 362 U.S. 440; *Kelly v. Washington*, 302 U.S. 1; *Clyde Mallory Lines v. Alabama*, 296 U.S. 261), railroads (*Terminal R.R. Ass'n v. Trainmen*, 318 U.S. 1; *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249; *Atlantic Coast Line v. Georgia*, 234 U.S. 280), and motor vehicles (*Clark v. Paul Gray, Inc.*, 306 U.S. 583; *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177; *Sproles v. Binford*, 286 U.S. 374; *Morris v. Doby*, 274 U.S. 135; *Hendrick v. Maryland*, 235 U.S. 610). Similarly, reasonable state regulations aimed at protecting public morals and welfare have been held valid as applied to interstate carriers. *E.g.*, *Hennington v. Georgia*, 163 U.S. 299.

More specifically, this Court has sustained state statutes regulating employment by interstate carriers. In the absence of Congressional action a State, for example, may examine and license trainmen engaged in interstate commerce for the purpose of insuring their fitness and skill (*Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama*, 128 U.S. 96; *Smith v. Alabama*, 124 U.S. 465); may require a minimum crew for the manning of interstate trains (*Chicago, R. I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453); and may

prescribe regulations for the payment of their wages (*Erie R. Co. v. Williams*, 233 U.S. 685).⁷

Equality of opportunity in employment is plainly a matter of local, as well as national concern. It follows that the Colorado statute is valid unless it places an undue burden upon interstate commerce either by presenting a threat of diversity of regulation in an area where uniformity is important to the free flow of commerce or by imposing some other practical interference with the movement of persons or goods.

B. THE COLORADO ANTI-DISCRIMINATION ACT CARRIES NO THREAT OF BURDENSOME DIVERSITY OF LOCAL REGULATION

The Colorado Supreme Court held that "[r]acial discrimination by an interstate carrier is a subject which must be free from diverse regulation by the several states and governed uniformly, if at all, by the Congress of the United States" (R. 294). The court did not consider whether application of the par-

⁷ These cases all assume that Congress had power to legislate concerning the fields involved, but held that, in the absence of a federal statute, the States have the power to regulate. Thus, the decisions do not depend on a restricted view of the power of Congress over interstate commerce, such as is found in *Adair v. United States*, 208 U.S. 161. There the Court held that Congress had no power under the commerce clause to prohibit interstate carriers from discharging an employee because of membership in a labor union. This decision was impliedly overruled in several cases decided by this Court. *E.g.*, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 187.

ticular Colorado statute at issue resulted in substantial impediment to the free flow of commerce. Instead, the court below relied simply upon a number of decisions of this Court invalidating state regulations governing racial discrimination.

That formulation of the issue is much too broad. This Court has never dealt with racial discrimination in general as a fixed category which either is, or is not, subject to state regulation. The true inquiry is whether the character and effect of the particular local statute are such as to create a practical danger of burdensome diversity.

The need for the more particular and practical inquiry is recognized in the precedents upon which the court below mistakenly relied. In *Hall v. De Cuir*, 95 U.S. 485, the Court, in holding unconstitutional a Louisiana statute prohibiting segregation in the seating of interstate passengers, stated that commerce could not flourish in the midst of the "embarrassments" which would flow from conflicting state laws requiring rearrangement of passengers at the border of each State through which the carrier passed. *Id.* at 489.³ In deciding that the statute in question imposed "a direct burden upon inter-state commerce," the Court said that "it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon

³ See also *South Covington & Cincinnati Street Ry. Co. v. Covington*, 235 U.S. 537, 547-548, invalidating a regulation limiting the number of passengers on interstate streetcars.

a view of the particular rights involved.” *Id.* at 488. Subsequently, in *Louisville, New Orleans and Texas Ry. Co. v. Mississippi*, 133 U.S. 587, 590, the Court characterized the decision in *Hall* as “by its terms carefully limited to those cases in which the law *practically* interfered with interstate commerce” (emphasis added).

In *Morgan v. Virginia*, 328 U.S. 373, the Court held that a Virginia statute requiring racially segregated seating of passengers on interstate buses was unconstitutional. The Court stated that the problem before it was to “appraise the weight of the burden of the * * * statute on interstate commerce,” and, in so doing, to determine from related statutes of other States “whether there [were] cumulative effects which * * * [made] local regulation impracticable.” *Id.* at 381-382. Since it found that eighteen States prohibited racial separation on public carriers and ten States required such separation (*id.* at 382), the Court concluded that “seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel” (*id.* at 386).⁹

⁹ It is possible that state-imposed racial discrimination concerning passengers on interstate carriers is always repugnant to the commerce clause, since such a requirement necessarily inhibits the movement of traffic from State to State. In a suit brought by the United States to restrain state-imposed racial segregation in an airport terminal, the district court held that such discrimination violated the commerce clause, without undertaking to analyze the nature and effect of the state action. *United States v. City of Montgomery*, 201 F. Supp. 590, 594 (M.D. Ala.); see also *United States v. Lassiter*, 203 F. Supp. 20, 25 (W.D. La.), affirmed, 371 U.S. 10. This

Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, demonstrates most convincingly that the practical effects of the particular state regulation on interstate commerce are decisive. There, the Court sustained the State's conviction of a corporation operating an excursion boat between Detroit and a Canadian amusement park for refusing passage to a Negro. In distinguishing the *Hall* and *Morgan* cases, as well as *Pryce v. Swedish-American Lines*, 30 F. Supp. 371 (S.D. N.Y.), the Court stated that none of those decisions was "comparable in its facts, whether in the degree of localization of the commerce involved; in the attenuating effects, if any, upon the commerce with foreign nations and among the several states likely to be produced by applying the state regulation; or in any actual probability of conflicting regulations by different sovereignties." 333 U.S. at 39.

The same point is repeatedly made in commerce cases not involving racial issues. For example, in *Bibb v. Navajo Freight Lines*, 359 U.S. 520, the Court invalidated, as applied to interstate motor carriers, an Illinois statute requiring trucks and trailers operating on that State's highways to be equipped with a special type of rear fender mud-guard which would have been illegal in Arkansas, which was different from those permitted in at least 45 other States, and which would have interfered approach, however, though sound in dealing with state action requiring discrimination, is inapposite where an anti-discrimination measure in aid of commerce (see *infra*, pp. 31-33) is involved.

seriously with the "interline" operations of motor carriers. The "massive showing of burden on interstate commerce which appellees made at the hearing" (*id.* at 528) was held to outweigh the state interest asserted. On the other hand, in *Huron Cement Co. v. Detroit*, 362 U.S. 440, a Detroit smoke pollution ordinance was sustained over commerce clause objections as applied to a water carrier which operated in interstate commerce. To the argument that other local governments might impose differing requirements concerning air pollution, the Court replied that the record contained "nothing to suggest the existence of any such competing or conflicting local regulations." *Id.* at 448.

Application of state fair employment practices acts to hirings by interstate carriers creates no real threat of a burdensome diversity of regulation impeding the flow of interstate commerce. This is apparent from two considerations.

First, the regulation deals with the employment relation not with the interstate movement of persons or goods. The limited incidence of the statute is highly important. Local regulation of the equipment used, of the packing of goods, or of the way in which passengers are seated would, except where prevented by the Fourteenth Amendment, open the door to diversity and conflict requiring new equipment and rearrangement of the passengers and goods at each state line. The *Hull* and *Morgan* cases rest upon this narrow ground. Here the activity regulated does not deal with employees or passengers while in flight.

Colorado was merely regulating hiring which occurred within its borders. The employment relation is formed prior to the employee's participation in the actual movement of interstate commerce.

The relevance of the distinction between state regulation of interstate commerce itself and activity prior to the commencement of interstate commerce has been repeatedly recognized by this Court. In upholding a state licensing requirement for railroad engineers in *Smith v. Alabama*, 124 U.S. 465, 482, the Court emphasized that the statute involved was "not, considered in its own nature, a regulation of interstate commerce"; that it was "properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction"; and that "so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely." In *Nashville, Chattanooga & St. Louis Ry. Co. v. Alabama*, 128 U.S. 96, the Court upheld a similar state statute. The Court again stated that "[s]uch legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce." *Id.* at 101.

The distinction between a statute which is "in its own nature, a regulation of interstate commerce" and a law which "only affects it incidentally" is irrelevant to the power of Congress to regulate the subject matter; indeed the precedents cited assume that Con-

gress had the constitutional power to act. The distinction is nonetheless material, we submit, although not always decisive standing alone, in determining whether a state law invades a field reserved exclusively to Congress even in the absence of federal legislation.

Second, the Fourteenth Amendment greatly minimizes, if it does not eliminate, the risk of conflicting state regulation of discrimination in employment. Any state law requiring discrimination or segregation because of race, creed, color or national origin would be plainly unconstitutional. See *Brown v. Board of Education*, 349 U.S. 294; *Bailey v. Patterson*, 369 U.S. 31; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54; *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 420; *Truax v. Raich*, 239 U.S. 33. In short, there can be no direct conflict with Colorado's prohibition of racial discrimination in hiring within its own territory since no other State could require a result inconsistent with that guaranteed by the Colorado statute.¹⁰

¹⁰ Nor could there be conflicting requirements today in the area of passenger seating. If a sister State were to require carriers to segregate passengers according to race, the requirement would violate the Fourteenth Amendment. *Bailey v. Patterson*, *supra*; *Mitchell v. United States*, 313 U.S. 80, 94; *Gayle v. Browder*, 352 U.S. 903, affirming 142 F. Supp. 707 (M.D. Ala.); *Flemming v. South Carolina Electric & Gas Co.*, 224 F. 2d 752 (C.A. 4), appeal dismissed, 351 U.S. 901. Hence, the possibility of conflict, which was the basis of the decision in *Hall v. DeCuir*, no longer exists. Thus, contrary to the opinion of the Colorado Supreme Court (R. 295-296), it is not inconsistent for the United States to argue that the commerce clause precludes a state requirement of racial segregation of passengers but does

It may be suggested that other States in which the carrier operates, though they could not adopt policies favoring discrimination, might establish their own anti-discrimination procedures; might make these procedures applicable to employers and employees doing business in the State; and that two commissions might reach differing results in the same factual situation. The possibility of such duplication is more hypothetical than real. State anti-discrimination commissions concern themselves principally with hiring practices within the State—not with hiring that has occurred elsewhere. See note, *The Right to Equal Treatment: Administrative Enforcement of Anti-Discrimination Legislation*, 74 Harv. L. Rev. 426, 566 (1961). There is no occasion to decide whether a State through which a carrier flies may regulate the hiring practices of that carrier, performed in its home State, or whether, if so, such regulation would have to give way in the event of conflict with regulation by the home State. The possibility that such a case will arise is considerably more remote than the possibility of conflicting regulation disregarded in the *Huron Cement* case (see *supra*, p. 25).¹¹

not forbid a state requirement prohibiting such a practice. For the former requirement could readily give rise to a conflict between various States, while the latter could not.

¹¹ Compare *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 37, where the Court upheld a state conviction against attack under the foreign commerce clause because the possibility that Canada might adopt regulations inconsistent with Michigan's was "so remote that it is hardly more than conceivable." Accord, *International Association of Machinists v. Gonzales*, 356 U.S. 617, 620.

Nor is there threat of conflict between national and state policies. Federal and state governments alike are required by the Fifth and Fourteenth Amendments to treat all citizens equally regardless of race or color (see *supra*, p. 27). While this does not, of course, mean that the federal and state governments are required to forbid racial discrimination by private employers, it does mean that the Constitution has established a national policy—which has been confirmed by Congress and the executive branch in numerous statutes and regulations—firmly opposed to discrimination. Cf. *Bob-lo Excursion Co. v. Michigan*, 333 U.S. 28, 37. Thus, unlike the situation in such cases as *Parker v. Brown*, *supra*, and *Southern Pacific Co. v. Arizona*, *supra*, there is no need to weigh the state interest against the national. Since both interests are the same, the Colorado Anti-Discrimination Act cannot be inconsistent with the commerce clause without the clearest kind of showing that the method the State has chosen places a heavy burden on interstate commerce. As we have noted, no such proof is even suggested in this case.

C. THE COLORADO ANTI-DISCRIMINATION ACT DOES NOT OTHERWISE
BURDEN THE FREE FLOW OF COMMERCE

We have shown that there is no danger of conflicting state regulation requiring invalidation of the Colorado Act on the theory that uniformity is needed to prevent a burden on interstate commerce. Nor does the Act otherwise impede the free flow of commerce from State to State.

First, there is no evidence that, either on its face or as applied, the Act discriminates against interstate commerce. Cf. *Dean Milk Co. v. City of Madison*, 340 U.S. 349; *Hood & Sons v. DuMond*, 336 U.S. 525. The same rule as to hiring is applied by Colorado whether a carrier moves in intrastate or interstate commerce.

Second, the Colorado Act does not impose substantial economic disabilities on interstate carriers, as this Court found resulted from the challenged state regulations in the cases relied on by the Denver district court (R. 270-272).¹² For example, in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 781, the Court found that a state statute limiting trains to a certain number of cars was "obstructive to interstate train operations" and had "a seriously adverse effect on transportation efficiency and economy." Since the Court found that, as a safety measure, the statute afforded "at most slight and dubious advantage," it concluded that "examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in adequate, economical and efficient railway transportation service, which must prevail." *Id.* at 779, 783-784.

In contrast, in this case there is no indication in the record that the Colorado statute unduly burdens

¹² *Bibb v. Navajo Freight Lines*, 359 U.S. 520; *St. Louis-San Francisco Ry. Co. v. Public Service Commission*, 261 U.S. 369; *Missouri, Kansas & Texas Ry. Co. v. Texas*, 245 U.S. 484; *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Kansas City Southern Ry. Co. v. Kaw Valley Drainage District*, 233 U.S. 75; *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U.S. 135; *Southern Pacific Co. v. Arizona*, 325 U.S. 761.

interstate commerce by placing onerous requirements on interstate transportation. The carrier is not told where or how to do its hiring. The Act does not cause delay in the carrier's operations or impose additional costs, apart from the relatively trivial cost of defending against a complaint of discrimination. There is no evidence that respondent has been or will be harassed with frivolous proceedings and no burdensome clerical tasks are demanded. The statute's sole requirement is that, if the carrier chooses to carry out its hiring process in Colorado, all applicants for employment shall be treated alike, regardless of their race or color. We see no basis for suggesting that this is onerous. Indeed, far from "burdening" interstate commerce, the Colorado law facilitates its free flow by ensuring that airlines hire pilots on the basis of their qualifications, and not the basis of irrelevant, as well as invidious, considerations.

Numerous cases decided by this Court strongly support the contention that the Act does not place undue burdens on interstate carriers. In *Missouri Pacific Ry. v. Larabee Mills*, 211 U.S. 612, the Court held that the commerce clause does not preclude a state court from issuing mandamus to compel a railroad company to afford equal local switching service to its shippers, even though the cars in regard to which the service is claimed are eventually to be engaged in interstate commerce. In the "full crew law" cases, this Court held that a State could require an interstate carrier to hire a specified, reasonable number of employees when operating its trains with-

in the State because of the State's dominant interest in the safety of railroad operations. *Chicago, R.I. & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453; *St. Louis & Iron Mtn. Ry. v. Arkansas*, 240 U.S. 518; *Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249. The result was that carriers were forced to hire what they considered to be an excessive number of employees.¹³ In *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, the Court rejected the contention that a Pennsylvania law which required vessels in the port of Philadelphia to take a pilot or pay one half the regular amount of pilotage fees was inconsistent with the commerce clause. *A fortiori*, a State does not unduly burden commerce by requiring a carrier, in the interest of the public welfare of the State, to hire the man best qualified for a position that the carrier wants to fill. Such a statute is "in aid, not in obstruction of commerce" (*Chicago, R.I. & Pac. Ry. Co. v. Arkansas, supra*, 219 U.S. at 466 (upholding a full crew law)).

¹³ In its *Southern Pacific* decision, the Court distinguished the full train crew cases on the ground that in these cases the state regulation "had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here." 325 U.S. at 782. The same factors make the present case like the full crew law cases and unlike *Southern Pacific*. Indeed, the Colorado statute has less of an effect on the actual interstate operation of the carrier than the full crew laws, because it does not result in adding or dropping employees at state boundaries.

II

NO FEDERAL STATUTE OR REGULATION PREVENTS THE APPLICATION OF STATE LAWS PROHIBITING DISCRIMINATION IN EMPLOYMENT

Under Article VI, clause 2 of the Constitution a federal statute is "the supreme law of the land," and any inconsistent State laws must yield. If Congress, exercising a proper legislative power, explicitly excludes concurrent state regulation, the States lose power to deal with the subject.¹⁴ If Congress expressly consents to supplemental, duplicate, or even inconsistent state regulation, the courts will give effect to the States' exercise of jurisdiction.¹⁵ Most federal statutes include no definitive declaration, leaving it to the judiciary to determine the intentment of the particular statute with respect to the application of concurrent state measures. And although the ultimate question is always one of legislative intent, the Court has developed general guides to the disposition of particular cases:¹⁶

¹⁴ *E.g.*, United States Warehouse Act, Section 29, 7 U.S.C. 269; Railway Labor Act, Section 2, 45 U.S.C. 152.

¹⁵ *E.g.*, Fair Labor Standards Act, Section 18, 29 U.S.C. 218; Labor-Management Reporting and Disclosure Act, Sections 603(a), 604, 29 U.S.C. (Supp. II) 523(a), 524; Securities and Trust Indentures Act, Section 8, 15 U.S.C. 77r.

¹⁶ See generally Dunham, *Congress, The States and Commerce*, 8 J. Pub. L. 47, 59-65 (1959); Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208 (1959); Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946: Ten Years of Federalism, 60 Harv. L. Rev. 262 (1946).

State regulation must give way if it actually conflicts with federal legislation either because the state and federal duties are inconsistent or because the State would deny a right conferred by the Congress. *E.g., United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62. The federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the act of Congress may touch a field in which the federal interest is so dominant that the federal statute will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern Ry. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line*, 272 U.S. 605. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538.

Such guides are useful but the ultimate question is always whether the application of state law would be accepted or rejected by one devoted to implementation of the policy legislated by Congress, in both its affirmations and limitations. The best test is whether the intervention of the State threatens to upset the balance of interests that Congress has struck. Thus,

Mr. Justice Black, speaking for the Court in *Hines v. Davidowitz*, 312 U.S. 52, 67, said that:

Our primary function is to determine whether, under the circumstances of the particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Mr. Justice Frankfurter pointed to the same critical question in *De Veau v. Braisted* 363 U.S. 144, 153:

Would Congress, with a lively regard for its own federal * * * policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy?

Federal laws will not lightly be held to preempt an area against state legislation. Throughout its history the Court has presumed the constitutionality of state statutes, and thus has repeatedly held that the police powers of the States are not superseded unless preemption was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, *supra*, 331 U.S. at 230-231; *California v. Zook*, 336 U.S. 725, 733; *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 749; *Maurer v. Hamilton*, 309 U.S. 598, 614; *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85; *Kelly v. Washington*, 302 U.S. 1, 11. In *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, this Court upheld—in a case similar to this one—the application of a New York statute prohibiting labor organizations from denying membership on the basis of race to an organization of federal postal clerks. In determining that various federal statutes regulating the terms and conditions of em-

ployment of such employees did not preempt the field, this Court said (*id.* at 97):

Congress must clearly manifest an intention to regulate for itself activities of its employees, which are apart from their governmental duties, before the police power of the state is powerless. * * * There is no such clear manifestation of Congressional intent to exclude in this case.

In the Colorado courts respondent urged that the field of ~~civil~~ ^{racial} discrimination in hiring by interstate carriers was preempted by: (1) the Civil Aeronautics Act of 1938, now known as the Federal Aviation Act of 1958; (2) the Railway Labor Act; and (3) federal executive orders forbidding discrimination by government contractors. The Denver district court held that the field was preempted by all three (R. 260-283). The Colorado Supreme Court approved the findings, conclusions, and judgment of the trial court but apparently preferred to rest its own decision upon the commerce clause (R. 293-296).

We submit that nothing in these federal laws and regulations precludes application of the Colorado Anti-Discrimination Act.

A. THE CIVIL AERONAUTICS ACT DID NOT PRECLUDE STATE LEGISLATION PROHIBITING DISCRIMINATION IN EMPLOYMENT BY INTERSTATE AIR CARRIERS

The Civil Aeronautics Act of 1938 (now the Federal Aviation Act)¹⁷ conferred upon the Civil Aero-

¹⁷ 52 Stat. 973, as amended, 49 U.S.C. (1952 ed.) 401-722. Subsequent to the discriminatory acts and exercise of jurisdiction by the Colorado Commission in this case, the Federal Aviation Act of 1958, 72 Stat. 737, 49 U.S.C. 1301-1542 took effect, reenacting the 1938 Act without giving the Board any substantial new powers except in the field of air safety. As the

nautics Board wide power to regulate routes and rates, to issue certificates of public convenience and necessity, to deal with unfair methods of competition, to scrutinize mergers, contracts and other inter-carrier transactions, and to regulate related activities. See H. Rep. No. 2254, 75th Cong., 3d Sess. (1938). But broad as this power may have been, the legislation did not totally remove all the activities of interstate air carriers from the reach of state law. They are subject to certain non-discriminatory state taxes. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292;¹⁸ *Braniff Airways, Inc. v. Nebraska Board*, 347 U.S. 590, 597. The States may regulate the intrastate transportation of persons and property other than mail. *People v. Western Air Lines*, 42 Cal. 2d 621, 268 P. 2d 723 (Sup. Ct.), appeal dismissed, 348 U.S. 859. And in *Porter v. Southwestern Aviation, Inc.*, 191 F. Supp. 42 (M.D. Tenn.), the federal district

Tennessee Supreme Court has stated, the 1958 Act is "merely an administrative measure, limited to the regulation of the operation of aircraft in the interest of public safety." *Southeastern Aviation, Inc. v. Hurd*, 209 Tenn. 639, 648, 355 S.W. 2d 436, 440, appeal dismissed, 371 U.S. 21.

¹⁸ While, as the court below noted (R. 279), Mr. Justice Jackson stated in *Northwest Airlines*, 322 U.S. at 303, that "[f]ederal control is intensive and exclusive," he did so in a concurring opinion which was his alone. It is apparent from Justice Jackson's opinion, moreover, that he was not of the view that the States were precluded even from all regulation of air commerce. On the contrary, the opinion concurred in the judgment of the Court upholding a Minnesota personal property tax applied to a fleet of airplanes operated by an interstate carrier with a home port in Minnesota. The gist of the concurring opinion was that the federally protected right of free transit through the navigable airspace overlying the States preempted state taxation or regulation of air transportation solely on the basis of such transit.

court held that a wrongful death action, involving alleged violations of the Federal Aviation Act, was not barred by the Act since "pre-emption was not the Congressional intent." *Id.* at 43.

The Civil Aeronautics Board was given no power by the Civil Aeronautics Act to regulate employment relations upon interstate air carriers, and no provision of the Act, with two possible exceptions, was addressed to any aspect thereof. Plainly, employment practices and terms and conditions of employment are susceptible of regulation in ways that will not interfere with, or duplicate, any segment of C.A.B. jurisdiction.

Two related provisions of the Aeronautics Act were invoked below in an effort to show that the Civil Aeronautics Board has been given jurisdiction over the specific subject of unjust discrimination in employment. Section 404(b) provided (now 49 U.S.C. 1374(b)):

No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

And Section 2 (now 49 U.S.C. 1302), which defined the public interest, directed the Board to consider:

(c) The promotion of adequate, economical, and efficient service by air carriers at reason-

able charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices * * *.

It has never been held that these provisions were or are applicable to discrimination in employment.¹⁹ The Civil Aeronautics Board has not applied them to employment. If they relate only to discrimination in the service offered—to discrimination among passengers, shippers, localities, etc.—then they have no bearing upon the present case. If they also apply to discrimination in employment, then the Civil Aeronautics Board could obtain an injunction against continued violations (see 49 U.S.C. (1952 ed.) 647; now 49 U.S.C. 1487) and could perhaps take the carrier's hiring practices into account in awarding routes and making other determinations. We made the latter assumption for the purposes of this case because even on this assumption, as we now show, Sections

¹⁹ The Denver district court relied (R. 279) upon *Fitzgerald v. Pan American World Airways*, 229 F. 2d 499, where the Court of Appeals for the Second Circuit held that one denied first-class passage on an air carrier because of his race could bring a civil action for damages in a federal court on the basis of 49 U.S.C. (1952 ed.) 484(b). The district court also noted (R. 281) that this Court had construed a similar provision in the Interstate Commerce Act to prohibit railroads from discriminating against Negro passengers. *Mitchell v. United States*, 313 U.S. 80. See also *Georgia v. United States*, 371 U.S. 9; *Boynton v. Virginia*, 364 U.S. 454; *Henderson v. United States*, 339 U.S. 816; *N.A.A.C.P. v. St. Louis-San Francisco Ry. Co.*, 297 I.C.C. 335; *Keys v. Carolina Coach Co.*, 64 M.C.C. 769.

2(c) and 404(b) did not preclude concurrent state regulation.

Manifestly there is, even on this assumption, no inconsistency between federal and state law, or federal and state policy. Both are aimed at the same objective. Respondent's argument for preemption is based upon occasional expressions in the opinions of the Court, such as (*Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604):

When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition.

See also *Missouri Pacific R. Co. v. Stroud*, 267 U.S. 404; *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 775; *Garner v. Teamsters Union*, 346 U.S. 485, 490-491; *Guss v. Utah Labor Relations Board*, 353 U.S. 1. But, as the Court pointed out in *California v. Zook*, 336 U.S. 725, 730, "the fact of identity does not mean automatic invalidity of state measures. Coincidence is only one factor in a complicated pattern of facts guiding us to congressional intent." The Court has more than once sustained partially parallel state and federal regulation.. *E.g.*, *California v. Zook*, *supra*; *De Veau v. Braisted*, 363 U.S. 144; *Parker v. Brown*, 317 U.S. 341. A federal statute will not preempt the field unless the danger of interference with a comprehensive federal scheme indicates the need for exclusivity or there is similar evidence that such is the legislative intent.

1. *The Federal Regulation, if any, of Discrimination in Employment by Air Carriers Was Not So Comprehensive and Detailed as To Suggest That Congress Intended It To Be Definitive*

Section 404(b) was primarily concerned with transportation service. The declaration of policy was directed towards the same central objective. If either Section 404(b) or Section 2(c) covered discrimination in employment, its application was a wholly collateral incident, not the main thrust of the legislation. Nor is the regulation detailed. The Civil Aeronautics Act contained none of the substantive safeguards or procedural and remedial provisions normally associated with any comprehensive measure for increasing equality of opportunity in employment.²⁰ It is scarcely believable that so short and incidental a reference to discrimination in employment could have been intended to oust the States of jurisdiction.

Thus, the present case is readily distinguishable from such precedents as *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, and *Pennsylvania R. Co. v. Public Service Comm.*, 250 U.S. 566, where the thoroughgoing federal supervision indicated that state regulation would interfere with a system intended to be complete. *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co.*, *supra*, was also a case of that character. Not only did the Interstate Commerce Act deal exhaustively with the relation between interstate

²⁰ For studies of attempts to enact a Federal Fair Employment Practice Act, see Ruchames, *Race, Jobs & Politics: The Story of FEPC*, pp. 199-213 (1953); Kovarsky, *Racial Discrimination in Employment and the Federal Law*, 28 Ore. L. Rev. 54, 62-69 (1958).

shippers and carriers by rail but the Carmack Amendment specifically prescribed the extent of liability for lost and damaged goods—the very subject of the divergent state legislation held to be superseded by federal law.

2. *There Is No Substantial Danger That Coincidental State Regulation Would Interfere With the Effectuation of the Federal Policy Either by Upsetting the Balance of Rights and Duties Established Thereunder or by Hampering the Operations of the Federal Agency*

Many subjects of legislation are by their nature unsuited to concurrent regulation and in these areas a federal law will normally be held to preempt the field against superficially parallel state regulation. *Missouri Pacific R. Co. v. Stro*, 1, 267 U.S. 404—upon which the respondent relied—was a case of this character. The Missouri statute and federal Interstate Commerce Act both forbade giving “any undue or unreasonable preference or advantage” to any shipper or locality. But the identity was only superficial. The bite of such general phrases would be in their application. The claim was that the carrier had discriminated in furnishing cars. Especially in times of shortage—the periods in which the statutes would be most important—only one agency could exercise final authority over the furnishing of cars; if there were two, the orders or findings of one might well impose obligations conflicting with those imposed by the other, even though both were applying the same general statutory terms.

The labor relations cases belong in the same category. Even where a state law is written in the same

terms as the federal labor act, there are wide opportunities for divergence, inconsistency, and confusion. Representation cases may be the best illustration. The statutory provisions of state and federal law governing the choice of bargaining representatives were often identical, but the administrative implementation of the same policies—in rules governing the time for elections, the effect of existing contracts, the definition of the bargaining unit, and the choices to appear on the ballot—might be so widely different that the application of state rules would frustrate the effectuation of the federal policies by the National Labor Relations Board. On this ground state agencies are held to have no jurisdiction to conduct representation proceedings involving employers and employees subject to the federal act. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767; *LaCrosse Tel. Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18.

Essentially the same rationale underlies the labor cases precluding state regulation of employer unfair labor practices and employee strikes and picketing, even when the parties are not exercising rights guaranteed by the federal act.²¹ The national labor policy is a delicate balance of guaranteed rights, statutory duties, and conduct left free from legal obligations for the interplay of the opposing forces. "The detailed prescription of a procedure for restraint of speci-

²¹ A state law forbidding the exercise of a right secured by the federal statute is manifestly invalid. *Hill v. Florida*, 325 U.S. 538; *International Union of United Automobile Workers v. O'Brien*, 339 U.S. 454; *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62.

fied types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. * * * For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner v. Teamsters Union*, 346 U.S. 485, 499-500. The principle is equally applicable both to the conduct of employers and to other employee activities. *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953.²² Furthermore, since the federal labor policies are expressed in broad terms and confided to a specialized agency to administer, identity of statutory language is no guarantee of similarity of regulation. Under such circumstances it is indeed true that "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, *supra*, 346 U.S. at 490-491.

In the case at bar there was no similar danger that the application of the Colorado Anti-Discrimination Act to interstate carriers would have interfered with the effectuation of any federal policy under the Aeronautics Act. The duty imposed upon air carriers by Section 404(b), assuming it applies to employment,

²² In most of the labor relations cases there has been room for the union to argue that state jurisdiction might result not merely in interference with conduct designed to be left untouched by regulation but even in state curtailment of a guaranteed right. *E.g.*, *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; *San Diego Building Trades Council v. Garmon*, 353 U.S. 26.

is the simple, straight-forward obligation to avoid "unjust discrimination" in employment. Any discrimination based upon race, creed, color, or national origin is obviously unjust. Upon this point there is no room for divergencies in state or federal administration. Surely it will not be suggested that the federal law manifests an intention that air carriers be free to engage in such discrimination in employment as the federal authorities do not prevent. Nor can it be supposed that Congress gave the Civil Aeronautics Board power to enforce the assumed prohibition against discrimination in employment because it perceived a need for a single specialized agency with exclusive jurisdiction to work out subordinate substantive policies, the pace and methods of enforcement, and the appropriate remedies for violations. The overwhelming concerns of the Civil Aeronautics Board are routes, rates, service to passengers and shippers, and the financial condition of air carriers. Congress could not have envisaged a Board charged with these duties as so expert in the field of discrimination in employment as to warrant its having exclusive jurisdiction. In the absence of evidence of such an intent it cannot be supposed that Congress was unwilling to have the States move faster, or provide different remedies, in prohibiting discrimination in employment than the Civil Aeronautics Board.

The danger, in any event, is minimal. For a State to impose a restriction in the area of employment practices that Congress did not intend would not interfere with the implementation of other policies committed to the Civil Aeronautics Board. The as-

sumed federal prohibition of discrimination in employment is not part of a nicely balanced, reticulated pattern of rights and duties such as one finds in the field of labor-management relations where the restriction of a form of employee activities or the imposition of a new employer duty in collective bargaining might affect the whole course of relations between company, employees, and union. Prohibition of discrimination in employment based upon race, creed, color, or national origin can hardly have an adverse effect upon air service, financial condition, routes, or rates.

It may be argued that the concurrent existence of federal and state regulations opens the door to the possibility that two forums will make conflicting findings as to the fact of discrimination upon the same set of circumstances. The danger is wholly theoretical. The Civil Aeronautics Board has never taken action against discrimination in employment. And in any event, the law has never treated the mere existence of alternate forums to hear the same dispute as sufficient ground for compelling the States to forgo jurisdiction. *E.g., Smith v. Evening News Ass'n*, No. 13, this term, decided December 10, 1962.

3. *The Federal Interest in Preserving Equal Opportunities in Employment Is Not so Preeminent nor the Demonstrated Need for Uniformity so Great as To Indicate That Congress Must Have Intended To Establish an Exclusive Rule*

The relative importance of the respective interests of the States and Nation in a particular subject of regulation bears upon the likelihood that Congress intended to preempt the field. It is far more probable

that Congress would exclude state regulation in areas affecting international relations or the national defense than that it would exercise the commerce power in such a way as to supersede state laws relating to public health. The Court drew heavily upon this consideration in invalidating Pennsylvania's alien registration law in *Hines v. Davidowitz*, 312 U.S. 52. Similar considerations entered into the judgment in *Pennsylvania v. Nelson*, 350 U.S. 497.

A State's interest in equality of opportunity in employment is at least as strong as that of the federal government. While interstate competition or the risk of labor disputes affecting interstate commerce might some day lead to the enactment of a uniform national rule, the areas most directly affected are the localities in which discrimination occurs. The State's interest is not materially diminished by the fact that the discrimination may sometimes run against non-residents, or that the employment may sometimes involve interstate journeys.

Nor is this an area in which state regulation is likely to lead to such embarrassing diversity as to make one quick to suppose that Congress was seeking to provide a single national rule (see *supra*, pp. 27-29). The present case contrasts with those involving federal statutes enacted after experience with state regulation had revealed the costs of conflict and confusion under diverse state legislation. See *Campbell v. Hussey*, 368 U.S. 297; *Adams Express Co. v. Croninger*, 226 U.S. 491, 506-507; *New York Central R. Co. v. Winfield*, 244 U.S. 147, 149-150; see also *Napier v.*

Atlantic Coast Line, 272 U.S. 605; *Southern Ry. Co. v. Railroad Commission*, 236 U.S. 439.

4. *The Bare Existence of Uncertain and Unexercised Federal Administrative Authority does not Preclude State Regulation of the Discriminatory Employment Practices of Interstate Air Carriers*

Any federal authority over racial or religious discrimination in employment is, at best, both uncertain and discretionary. The Civil Aeronautics Board has never claimed nor exercised the power to intervene. The Court has frequently refused to find supercession where federal agency power, though clear, "lies dormant and unexercised." *Bethlehem Steel Company v. New York State Labor Relations Board*, 330 U.S. 767, 775.²² Accord, *H. P. Welch Co. v. New Hampshire*, 306 U.S. 79; *Northwestern Bell Telephone Co. v. Nebraska State Railway Commission*, 297 U.S. 471. In the *Bethlehem Steel* case, the Court declared (330 U.S. at 774):

[W]hen federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject * * *, or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal administrative regulation * * *.

²² In *Bethlehem Steel*, the Court did find preemption since federal power had been exercised.

The states are in those cases permitted to use their police power in the interval. [Citations omitted.]

And in *Garner v. Teamster Union*, *supra*, the Court carefully distinguished the situation where "the federal Board would decline to exercise its powers once its jurisdiction was invoked." 346 U.S. at 488.

The force of these decisions is not impaired by *Guss v. Utah Labor Relations Board*, 353 U.S. 1, where the Court held that the National Labor Relations Act displaced state power to deal with labor relations affecting interstate commerce, even where the Labor Board had declined to exercise its jurisdiction. The Court declared that "in each case the question is one of congressional intent," and found a "general intent to preempt the field" of labor-management relations in businesses affecting commerce. The Court, emphasizing that the Board had not ceded jurisdiction to a state agency, as Section 10(a) of the Act authorized, held that Section 10(a) carried with it an "inescapable implication" that a cession agreement was to be the only method of authorizing intervention by a State. 353 U.S. at 10. It is also significant that the boundaries of the discretionary jurisdiction of the National Labor Relations Board not only shifted from time to time in the exercise of the Board's discretion but each set of current standards was imprecise and subject to exceptions, so that the recognition of any state authority created danger of subjecting to inconsistent state laws employees and employers subject to actual federal regulation.

In summary, any federal regulation of discrimination in employment was incidental to the main purposes of the Aeronautics Act; concurrent state authority carries no significant threat of interference with the effectuation of the federal policy, either substantively or procedurally even if the Civil Aeronautics Board were to exercise any power which has until today lain uncertain and unused. Under these conditions the existence of a short federal expression of policy paralleling the more comprehensive state legislation, far from indicating an intent to oust the States of jurisdiction, was the plainest indication that there was no federal objection to the enforcement of state law. In a similar situation in *De Veau v. Braisted*, 363 U.S. 144, the Court upheld a New York statute disqualifying felons from holding office in any waterfront labor organization even though a federal statute imposed a similar restriction. In his opinion for four Justices, Mr. Justice Frankfurter said (*id.* at 156):

The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through § 8 * * * is surely evidence that Congress does not view such a restriction as incompatible with its labor policies.

B. THE RAILWAY LABOR ACT DOES NOT PRECLUDE COLORADO FROM PROHIBITING DISCRIMINATORY HIRING BY INTERSTATE AIR CARRIERS

While certain provisions of the Railway Labor Act, 45 U.S.C. 151, 152, 154-163, 181-188, apply to air carriers, these provisions, like the entire Act, deal only with union organization and collective bargaining be-

tween the carriers and their employees. Thus, 45 U.S.C. 151a states that the general purposes of the Act are to guarantee the right of employees to organize and bargain collectively and to facilitate the settlement of disputes over matters such as working conditions and rates of pay. The National Mediation Board, which is established by the Act, may be utilized only in a dispute "between an employee or group of employees and a carrier * * * ." 45 U.S.C. 155. Under the Act it is the "duty of every carrier and of its employees * * * to establish" boards of adjustment, which are used only in connection with "disputes between an employee or group of employees and a carrier or carriers." 45 U.S.C. 184. The National Air Transport Adjustment Board, which is authorized to be established by 45 U.S.C. 185, but has not yet been established, is limited by that Section to settling disputes between air carriers and their "employees." The Act defines "employee" as "every person in the service of a carrier * * * who performs any work" (45 U.S.C. 151), thereby excluding persons who have not yet been hired. In short, no provision of the Act, whether applying to air carriers or not, governs racial discrimination by an employer in hire, tenure, or terms of employment.

The Denver district court recognized that there is no provision in the Railway Labor Act dealing with racial discrimination in hiring (R. 274). The court, however, relied upon decisions of this Court (*Conley v. Gibson*, 355 U.S. 41; *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768; *Graham v. Brotherhood of Firemen*, 338 U.S. 232; *Tunstall v. Brotherhood of*

Locomotive Firemen, 323 U.S. 210; *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192), which, it said, established that "racial discrimination by employers subject [to the Railway Labor Act] is forbidden" (R. 274). None of the decisions so holds. Rather, they determine that an exclusive bargaining agent, which has been chosen by employees pursuant to the Railway Labor Act, may not use the powers granted by the Act to discriminate against minorities or to achieve any other objective not relevant to the purpose of the statute. To be sure, the Court said that an abuse of the power of a union may not be accomplished by contracts with a carrier, and it held that employers, as well as unions, might be restrained from acting under bargaining agreements that discriminate against Negro employees. But, as the Court explicitly stated, the contracts were unenforceable not because of any obligation on the employer, but because of bargaining agent was not authorized by the Act to enter into discriminatory agreements. *Brotherhood of R.R. Trainmen v. Howard*, *supra*, 343 U.S. at 772-775; *Steele v. Louisville & Nashville R.R.*, *supra*, 323 U.S. at 203-204. See also *Conley v. Gibson*, 355 U.S. 41, 45, which emphasized that, although the railroad was engaging in the underlying discriminatory acts, the breach of duty was by the union.

The complete compatibility of the Colorado Anti-Discrimination Act with the Railway Labor Act has been demonstrated by practical experience. The National Labor Relations Act imposes upon collective bargaining representatives the same duty of fair representation as the Railway Labor Act, either as an

obligation enforceable by individual suits or as an aspect of the union's duty to bargain collectively. *Wallace Corp. v. National Labor Relations Board*, 323 U.S. 248; Cox, *The Duty of Fair Representation*, 2 Villanova L. Rev. 151. At least twenty States have fair employment practices acts. The statutes have been administered by state agencies altogether distinct from the agencies enforcing state labor relations acts; and they have been extensively applied to employers subject to the National Labor Relations Act. In practice there has been no conflict, inconsistency, or confusion. The explanation is that the labor relations acts deal with one segment of employer-employee relations—union organization and collective bargaining as a method of fixing terms and conditions of employment—whereas the anti-discrimination laws deal with another—the promotion of equal opportunity in employment regardless of race, creed, color, or national origin. The duty of fair representation imposed upon collective bargaining representatives by the labor relations acts—far from raising dangers of collision—eliminates any risk that employers and employees may negotiate *valid* collective bargaining agreements inconsistent with the requirements of state anti-discrimination laws.^{23a}

^{23a} See *Atchison, Topeka and Santa Fe Ry. Co. v. Fair Employment Practice Commission of California*, 7 Race Rel. L. Rep. 164 (Los Angeles Superior Court, January 30, 1962), rejecting the contention that application of a state fair employment practice act to a railroad was preempted by the Railway Labor Act.

C. FEDERAL EXECUTIVE ORDERS RELATING TO GOVERNMENT CONTRACTORS DO NOT PRECLUDE COLORADO FROM PROHIBITING DISCRIMINATORY HIRING BY SUCH A CONTRACTOR

In holding that federal law precludes the application of the Colorado Anti-Discrimination Act to interstate air carriers, the Denver district court also relied in part upon federal executive orders requiring contracting agencies of the federal government to include in their contracts a clause forbidding employment discrimination in connection with work under the contracts. Executive Order 10479, 18 Fed. Reg. 4899 (August 13, 1953); Executive Order 10557, 19 Fed. Reg. 5655 (September 3, 1954).²⁴ The court purported to take judicial notice that "[a]s a certified commercial carrier by air, [respondent] is obligated to and in fact does transport United States mail under contract with the United States Government" (R. 284).

The state district court erred in two respects. First, respondent in fact had no contract whatever with the

²⁴ In Executive Order 10557, President Eisenhower ordered that the following clause be included in all contracts executed by contracting agencies of the federal government: "In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin." Executive Orders 10479 and 10557 were revoked and superseded by Executive Order 10925 issued by President Kennedy on March 6, 1961. 26 Fed. Reg. 1977. It requires all contracting agencies of the federal government to include a clause similar to that prescribed by the earlier executive orders in each government contract. In addition, the new executive order requires inclusion in the contract of a clause stating that "the contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin."

federal government.²⁵ In its determination to the contrary, the court relied on 49 U.S.C. 1375, which requires any airline to carry mail. But, while this provision bound respondent to carry mail (which it did), it does not forbid discrimination or compel the execution of a contract subject to the executive orders.

Second, even if a federal regulation concerning contract provisions could preempt state legislation, in the absence of strong evidence to the contrary it could hardly be assumed that the federal government, in promulgating the executive orders in order to lessen racial discrimination, intended to permit companies to utilize federal contracts as a means to avoid existing state fair employment practice acts. The evidence is all the other way. Before the issuance of the executive order, the President's Committee on Civil Rights recommended in 1947 both state and federal action to meet the problems of civil rights: "Parallel state and local action supporting the national program is highly desirable. * * * [T]he enactment of a federal fair employment practice act will not render similar state legislation unnecessary." *To Secure These Rights*, p. 102 (1947). Executive Order 10479 expressly directed the President's Government Contract Committee "to establish and maintain cooperative relationships with agencies of state and local governments * * * to assist in achieving the purposes of this order." See also Executive Orders 10557 and 10925.

²⁵ The government filed an affidavit stating this fact in the Colorado Supreme Court.

Finally, experience has shown that federal-state co-operation with respect to complaints against employees who are under a contractual non-discrimination obligation to the federal government is mutually beneficial.²⁶ No conflict, therefore, is to be anticipated between federal and state action. And no national interest is jeopardized by the coordinate enforcement by the federal and state governments of harmonious anti-discrimination policies.²⁷

²⁶ Thus, federal investigators have usually accepted a State's finding of no discrimination. On the other hand, a state commission dealing with a government contractor may use the threat that his activities will be reported to the federal government with the possible result that his contract will be cancelled. Note, *The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation*, 74 Harv. L. Rev. 526, 575-576 (1961).

²⁷ If the state court's view were adopted, an employer could often render a pending proceeding before a state commission a nullity by simply negotiating a contract with the federal government. We do not believe that the constitutional power of the States to prohibit racial discrimination should be permitted to turn upon the individual decisions of potential contractors, constantly shifting with the negotiation and termination of thousands of individual contracts.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

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APPENDIX

The Colorado Anti-Discrimination Act of 1957 (1953 Colo. Rev. Stat. § 80-24-1, *et seq.* (Perm. Supp. 1960)) reads in pertinent part as follows:

80-24-2. Definitions.— * * *

(5) "Employer" shall mean the state of Colorado or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing six or more employees within the state; * * *

80-24-6. Discriminatory and unfair employment practices.—

(1) It shall be a discriminatory or unfair employment practice * * *

(2) For an employer to refuse to hire * * * any person otherwise qualified, because of race, creed, color, national origin or ancestry.

Article I, Section 8, Clause 3 of the Constitution of the United States reads as follows:

The Congress shall have power * * *

* * *

(3) To regulate commerce with foreign Nations, and among the Several States, and with the Indian Tribes; * * *

49 U.S.C. (1952 ed.) 484(b) provided (and 49 U.S.C. 1374(b) now provides) that:

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person,

port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

49 U.S.C. 402 (1952 ed.) provided (and 49 U.S.C. 1302 now provides) in pertinent part that:

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

* * * *

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices: * * *

Executive Order 10557, 19 Fed. Reg. 5655 (September 8, 1954), revoked by Executive Order 10925 26 Fed. Reg. 1977 (March 6, 1961), provided in pertinent part that:

WHEREAS the contracting agencies of the United States Government are required by existing Executive orders to include in all contracts executed by them a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and obligating the contractor to include a similar clause in all subcontracts, and

* * * *

WHEREAS the Committee on Government Contracts, in consultation with the principal contracting agencies of the Government, has recommended that in the future the contracting agencies of the Government include in place of, and as a means of better explaining, the pres-

ent nondiscrimination provision of Government contracts, the following provision:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. * * *

The contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

Now, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and in order to clarify the provisions of the existing orders, it is ordered as follows:

SECTION 1. The contract provision relating to nondiscrimination in employment, recommended by the Committee on Government Contracts, is hereby approved.

SEC. 2. The contracting agencies of the Government shall hereafter include the approved nondiscrimination provision in all contracts executed by them on and after a date 90 days subsequent to the date of this order, except:

a. Contracts and subcontracts to be performed outside the United States where no recruitment of workers within the limits of the United States is involved; and

b. Contracts and subcontracts to meet other special requirements or emergencies, if recommended by the Committee on Government Contracts.

* * * * *

Executive Order 10925, 26 Fed. Reg. 1977 (March 6, 1961), provides in pertinent part that:

WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and

WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and

WHEREAS it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and

WHEREAS it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; and

WHEREAS a review and analysis of existing Executive orders, practices, and government agency procedures relating to government employment and compliance with existing non-discrimination contract provisions reveal an urgent need for expansion and strengthening of efforts to promote full equality of employment opportunity; and

WHEREAS a single governmental committee should be charged with responsibility for accomplishing these objectives:

Now, THEREFORE, by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

* * * * *

SECTION 301. Except in contracts exempted in accordance with section 303 of this order, all government contracting agencies shall include in every government contract hereafter entered into the following provisions:

"In connection with the performance of work under this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

* * * * *

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IN THE
Supreme Court of the United States
October Term, 1962

No. 146

**THE COLORADO ANTI-DISCRIMINATION COMMISSION AND ED-
WARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE,
AND GEORGE O. CORY, as members of said Commission,**
Petitioners,

v.

CONTINENTAL AIR LINES, INC., Respondent.

No. 492

MARLON D. GREEN, Petitioner,

v.

CONTINENTAL AIR LINES, INC., Respondent.

**ON WRITS OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF COLORADO**

BRIEF FOR THE RESPONDENT

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February 1963

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IN THE
Supreme Court of the United States
October Term, 1962

No. 146

THE COLORADO ANTI-DISCRIMINATION COMMISSION AND ED-
WARD MILLER, MRS. PAUL BUDIN, CLARENCE C. BELLINGER,
GENE MANZANARES, ROBERT C. KEELER, GEORGE J. WHITE,
AND GEORGE O. CORY, as members of said Commission,
Petitioners,

v.

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v.

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ON WRITS OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Colorado (R.
288-309) is reported at 368 P.2d 970. The opinion has not
yet been reported in the official state reports.

JURISDICTION

The judgment of the Supreme Court of Colorado was entered on February 13, 1962 (R. 310). Timely petitions for rehearing were filed by petitioners herein on February 21, 1962 (Colorado Anti-Discrimination Commission) (R. 311) and February 28, 1962 (Marlon D. Green) (R. 313). The original opinion of the court below was modified on rehearing and, as modified, adhered to by order of court dated March 5, 1962 (R. 314). Petitions for writs of certiorari were filed by Green on April 30, 1962 and by the Commission on May 26, 1962. Both petitions were granted and the cases consolidated on October 8, 1962 (R. 314-315). The jurisdiction of this Court is invoked by petitioners under 28 U.S.C. § 1257(3) upon allegations that the validity of a state statute is drawn into question on the grounds of repugnancy to the Constitution of the United States (Comm. Brief 2; Green Brief 3). Continental submits that this Court lacks jurisdiction under 28 U.S.C. § 1257(3) because the opinion of the court below rests upon an adequate and independent non-federal ground.

QUESTIONS PRESENTED

1. Whether the decision below rests upon an adequate and independent non-federal ground where, in addition to discussion of federal questions by the Supreme Court of Colorado, that court (1) affirmed the decision of the trial court without reservation and approved the trial court's findings and conclusions, and (2) the decision of the trial court specifically held "... that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce."

2. Whether application of the Colorado Anti-Discrimination Act of 1957 to the flight crew personnel of an interstate air carrier is barred by Article I, Section 8 of the United States Constitution as an undue burden on commerce?

3. Whether either the Civil Aeronautics Act (now the Federal Aviation Act) or the Railway Labor Act prohibit racial distinctions by interstate air carriers as to flight crew personnel engaged in interstate operations and pre-empt that field, thereby precluding application of the Colorado Anti-Discrimination Act of 1957.

STATUTES INVOLVED

The pertinent constitutional and statutory provisions are as follows:

1. Constitution of the United States, Article I, Section 8, Clause 3:

"The Congress shall have Power . . .

.

"(3) To regulate Commerce with foreign Nations, and among the several States, . . ."

2. Civil Aeronautics Act of 1938, § 404(b), 52 Stat. 993 (1938), 49 U.S.C. § 484(b) (1952):

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air

transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

3. Civil Aeronautics Act of 1938, § 1007, 52 Stat. 1025 (1938), as amended, 54 Stat. 1235 (1940), 49 U.S.C. § 647 (1952):

"(a) If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board, its duly authorized agent, or, in the case of a violation of section 481(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of said provision, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of said provision or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto.

"(b) Upon the request of the Board, it shall be the duty of any district attorney of the United States to whom the Board may apply to institute in the proper court and to prosecute under the direction of the Attorney General all necessary proceedings for the enforcement of the provisions of this chapter or any rule, regulation, requirement, or order thereunder;

or any term, condition, or limitation of any certificate or permit, and for the punishment of all violations thereof, and the costs and expenses of such prosecutions shall be paid out of the appropriations for the expenses of the courts of the United States."

4. Additional provisions of the Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), as amended, 49 U.S.C. §§ 401-722 (1952), certain provisions of the Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. §§ 1301-1542 (1958); and of the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-188 (1958) are referred to in the argument and are cited or set forth therein.

STATEMENT OF THE CASE

The proceedings which bring the instant case to this Court were commenced when Marlon D. Green ("Green") filed a complaint against Continental Air Lines, Inc., ("Continental") with the Colorado Anti-Discrimination Commission ("Commission") (R. 1). The Commission, an administrative agency of the State of Colorado, derives its powers and duties from the Colorado Anti-Discrimination Act of 1957 ("Colorado Act"), 1953 Colo. Rev. Stat. §§ 80-24-1 through 80-24-8 (1960 Perm. Supp.).

While denying generally the material allegations contained in Green's complaint, Continental additionally asserted in its answer that the United States had pre-empted and reserved to its exclusive regulation and control the operations of interstate air carriers and that application of the Colorado Act to such a carrier constituted an undue burden on interstate commerce in violation of Article I,

Section 8, of the Constitution of the United States (R. 6). The Commission conducted a hearing on Green's complaint (R. 7-222) and, some seven and a half months later, purported to enter findings, conclusions and orders adverse to Continental (R. 223-227).

In accordance with 1953 Colo. Rev. Stat. § 80-24-8 (1960 Perm. Supp.), which provides for judicial review of orders entered by the Commission, Continental filed its complaint and petition for review in the State District Court in Denver, Colorado (R. 227-235). Upon hearing in the District Court, the case was remanded to the Commission for additional findings on specified matters relating to the interstate commerce issues. The Commission instead attempted to withdraw its initial order and substituted new findings and conclusions. These "procedural irregularities led to dismissal of the action in the District Court and initial review by the Supreme Court of Colorado. *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83 (1960). The Supreme Court of Colorado held that the Commission's action in substituting orders was improper, and returned the case to the Denver District Court with instructions to pass upon the merits of Continental's complaint against the initial Commission order.

Although not germane to the issues as to which certiorari has been granted by this Court, petitioners, in their respective statements of the case, have treated at some length miscellaneous factual matters submitted to, but not decided by, the courts below. A resume of the matters actually raised below will, it is believed, assist in delineating the issues before this Court.

Continental's complaint and petition for review in the Denver District Court stated six separate claims for relief. The first and second claims, as noted above, dealt with the applicability of the Colorado Act to Continental's cockpit personnel. Continental's third claim asserted that the Commission's findings were without evidentiary support and, further, that certain evidence was improperly received; its fourth claim attacked the Commission's refusal to permit Green's voluntary withdrawal of his complaint prior to any decision by the Commission; and its fifth and sixth claims were directed against a number of significant irregularities in the Commission's conduct of the hearing and post-hearing procedures in this matter (R. 228-235). Petitioners' statements of the case stress only the evidence deemed by them material to the third claim for relief; no reference is made to the substantial issues involving Green's withdrawal of his complaint and the failure of the Commission to follow prescribed rules of procedure.

Continental vigorously challenged the sufficiency of the evidence upon which the Commission's findings were based. It was not disputed that Continental interviewed 14 pilot applicants in June 1957, of whom six, including Green, were found qualified to undergo the Company's flight training program. Of the six found to be so qualified, four were enrolled in the July training class. The names of Green and the sixth man were retained as qualified applicants eligible for employment (R. 103) and Green was so advised (R. 52). His name was withdrawn from Continental's list of qualified applicants only after it was learned that he had embarked upon a series of suits against other employers.¹ Continental believed that in-

¹See opinion of the trial court (R. 260).

volvement in such other proceedings would have materially hindered his flight training. Moreover, because of the importance to its business of the impression of stability conveyed by its pilots, it was Continental's policy not to hire, or to retain, pilots who became involved in public controversy (R. 103-104, 114-115).

The only evidence which arguably could be said to support Green's complaint came from agents of the Commission who testified as to conversations with a Continental vice president. During one of these conversations the Continental representative, speaking as an individual, mentioned certain possible adverse effects which could be occasioned by the employment of a Negro pilot by any airline. Continental, while denying that these statements indicated a discriminatory purpose, asserted that they had been made during an attempted conciliation and compromise and were privileged and thus inadmissible, both by agreement and by statute (R. 231).

In addition to its attack on the jurisdiction of the Commission over these proceedings, Continental raised serious constitutional objections to the manner in which the hearing and post-hearing procedures were conducted (R. 233-234). Although Green's complaint was set for hearing before the entire Commission sitting as hearing examiners, the actual proceedings were conducted before varying groups of commissioners. Only five of the seven commissioners were present at any time during the first day of the hearing, only three commissioners were present at any time during the second day of the hearing, and only two of the commissioners were present during the entire proceedings. One of the commissioners attended only the

hearing session during which Green testified on direct examination (R. 41). Although the Commission's own rules and regulations require the hearing examiners to submit findings of fact and the basis therefor to the Commission, no such findings were made in this case. Instead, the entire Commission, including those members who were never present as well as those who attended only portions of the hearing, purported to make credibility evaluations and enter findings of fact and conclusions.

The hearing on Green's complaint was held on May 7 and 8, 1958. Neither the Commission itself nor any commissioner filed a complaint in this case as they are permitted to do under the Act. 1953 Colo. Rev. Stat. § 8024-7 (1) (1960 Perm. Supp.). The only matter before the Commission was the complaint of Green, a private individual.

On December 14, 1958, before the Commission had entered an order of any kind with respect to Green's complaint, Green sent the following telegram to the Commission with a copy to Continental:

"Urgently request withdrawal of my complaint against Continental Air Lines. Signed, Marlon D. Green." (R. 235, 236).

Notwithstanding this emphatic telegram, the Commission, on December 19, 1958, entered its initial decision in which it stated, without giving any reason, that the hearing examiners refused to consent to the withdrawal and pursuant to which Green was given an option to take advantage of the order against Continental (R. 225-226). He subsequently elected to do so.

The validity of the regulation by which the Commission attempted to limit Green's right to withdraw his complaint, and the action of the hearing examiners in withholding consent to such withdrawal, were briefed and argued at length in both the Denver District Court and the Supreme Court of Colorado. It was and is Continental's position that the regulation which attempted to limit the withdrawal of Green's private complaint, as distinguished from a complaint filed by the Commission, is in derogation of the statutory purpose to resolve by conciliation or settlement private disputes pertaining to racial or religious matters, and is therefore beyond the power of the Commission to adopt and hence invalid. It is Continental's further position that the action of those unidentified hearing examiners who refused to consent to the withdrawal was equally inconsistent with the purpose of the Act and improper.

It was in this posture that the action came on for review on the merits by the Denver District Court. Because that court concluded that Continental's jurisdictional claims were determinative, it did not reach the several other bases on which relief was sought. The trial court, in an extensive opinion, first examined the statute and found that "the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" (R. 260). It then found, based upon a court-approved stipulation (R. 256), that Continental is a commercial carrier by air operating under a certificate of public convenience and necessity issued by the Civil Aeronautics Board, that Continental transports passengers, freight, and United States mail between the states of Colorado, California, Illinois, Kansas, Missouri, New Mexico, Oklahoma and Texas, and that the pilot position

sought by Green involved interstate operations (R. 260-261). The trial court recognized that one of the salient elements of interstate transportation was its routine and frequent multi-state contacts (R. 269). Thereafter, it further found that the Colorado Act could not constitutionally be extended to cover flight crew personnel of interstate air carriers (R. 285). Based on these findings and conclusions it set aside the findings of the Commission and dismissed the complaint (R. 285). The Supreme Court of Colorado, on writ of error, reviewed the decision of the District Court, and, *inter alia*, held that "The only question resolved [by the trial court] was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground." (R. 293). Having thus interpreted the decision of the court below, it affirmed that decision, not only as to the result but also as to the District Court's findings and conclusions (R. 293). In so doing the Supreme Court of Colorado also affirmed the District Court's findings and conclusions that the Colorado Act could not constitutionally be applied in this case under established rules of preemption and burden on interstate commerce.

Thus the issue is not whether Colorado has the general power to pass an anti-discrimination law. Such contention has not been made by Continental. The only orders in this case relate specifically to flight crew personnel of an interstate air carrier, and the issue which has been ruled upon is whether the Colorado Act is applicable to such persons.

The Supreme Court of Colorado noted that other issues remain in the case when it stated:

"If the question [whether the Colorado statute may be applied to flight crew personnel of an interstate air carrier] is answered in the negative other arguments directed to the merits of the action, and questions relating to the validity of the act when tested by provisions of the Colorado Constitution are academic and of no materiality to the issue to be determined." (R. 293)

Continental's position with respect to these matters has been indicated above. Such other issues involve important substantive and procedural questions which have not been ruled upon at any time by any court.

SUMMARY OF THE ARGUMENT

1. The issue below was whether the Colorado Anti-Discrimination Act does apply, or can under the Constitution of the United States be applied, to the flight crew personnel of Continental Air Lines, Inc., an interstate air carrier. The Supreme Court of Colorado stated:

"The only question resolved [by the trial court] was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment was based exclusively on that ground."

and thereafter approved and affirmed the holding of the trial court on this point, in addition to its affirmance of the trial court's holdings on the federal pre-emption and burden on commerce issues. One of the three bases of the decision below thus being on an independent non-federal ground, jurisdiction is lacking in this Court. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210.

2. Members of Continental's cockpit crews are, by the nature of their occupation, continuously and uniquely engaged in interstate commerce, and the application of diverse or inconsistent state and local regulations to such limited group constitutes an impermissible burden on Commerce. In addition, the teaching of *Morgan v. Virginia*, 328 U.S. 373, and *Hall v. DeCuir*, 95 U.S. 485, that regulation of the racial practices of interstate carriers must be uniform is of even greater force when local regulation of such type is attempted to be applied to those who physically operate carriers, as distinguished from carrier passengers.

3. Federal regulation of certificated air carriers, both generally as to flight operations and specifically as to matters of racial discrimination, is so extensive as to occupy the field to the exclusion of local regulation. The Railway Labor Act prohibition against racial discrimination, initially held applicable to bargaining agents, has been applied as well to the employing carriers, *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, and affords protection to prospective employees as well as to personnel already employed. The Civil Aeronautics Act of 1938 (applicable when this action arose) and rules and regulations promulgated thereunder, constitute a comprehensive federal regulation controlling all phases of Continental's flight operations, including the standards and qualifications of its flight crew personnel. Moreover, § 404(b) of the Civil Aeronautics Act affirmatively prohibits carriers from discriminations of all kinds, including those based on race, and other sections of this statute establish remedial procedures for aggrieved persons. By these statutes Congress evidenced its recognition of the funda-

mental need for uniform national control of air carrier operations and its intent to exclude diverse or inconsistent state and local regulation.

ARGUMENT

I. This Court Lacks Jurisdiction Because the Supreme Court of Colorado Relied, inter alia, Upon an Independent and Adequate Non-Federal Ground as a Basis for its Decision.

Continental contends that the opinion of the Supreme Court of Colorado is not based solely on the Commerce Clause issues of pre-emption and burden on commerce. Continental submits that the decision of the Supreme Court of Colorado is that the Commission did not have jurisdiction in this matter for three reasons: first, the Colorado statute did not give the Commission jurisdiction over Continental's flight crew personnel; second, Congress has pre-empted this field; and third, if applied to Continental in this case the Colorado Act is an unconstitutional burden on commerce. Continental is aware that the Supreme Court of Colorado modified its initial opinion and will discuss that subject in more detail below. Notwithstanding that modification Continental submits that the independent non-federal ground remains as a basis for the decision of the Supreme Court of Colorado and consequently jurisdiction is lacking in this Court.

The trial court included a non-federal ground as a basis for its decision. That court held "that the Colorado legislature was not attempting to legislate concerning problems involving interstate commerce" when it enacted the 1957 Colorado Act (R. 260). It arrived at this con-

clusion after reviewing the 1957 Act and other pertinent Colorado statutes (R. 258-260). The trial court also held that the Act, to the extent applied to Continental's flight crew personnel, was invalid as creating a burden upon commerce and that Congress had pre-empted the area (R. 272-273, 285). The Supreme Court of Colorado clearly affirmed the trial court's decision on the pre-emption and burden grounds (R. 292, 294). However, the Supreme Court of Colorado in its opinion as it now stands interpreted the trial court's decision as resting on the state ground also, stating that:

"The only question resolved was that of jurisdiction. The trial court determined that the act was inapplicable to employees of those engaged in interstate commerce, and the judgment [of the trial court] was based exclusively on that ground." (R. 293).

In its original opinion the Supreme Court of Colorado stated, as the basis for the non-federal ground, the identical rationale of the trial court in practically identical language as follows:

"This language [referring to 1953 C.R.S. § 80-24-2(5)] negatives the idea that there was any attempt on the part of the legislature to legislate upon a matter involving interstate commerce."

The Supreme Court of Colorado deleted this single sentence in its final opinion when the petitions for rehearing filed by Green and the Commission were denied. Otherwise the original opinion remains unchanged. In the opinion as it now stands the Supreme Court of Colorado sets forth with apparent approval earlier state laws recognizing federal jurisdiction and authority in the realm of

aeronautics (R. 290). Furthermore, the Supreme Court of Colorado not only affirmed the trial court's findings and conclusions without reservation, but proceeded to say:

"The findings, conclusions and judgment of the the trial court might well be adopted in toto as the opinion of this court. However in the interest of brevity we will do no more than mention a few decisions which we think control the result." (R. 293).

Thus, the opinion of the court below, even as amended, still finds that the trial court determined the Act was inapplicable to employees of those engaged in interstate commerce, and continues to affirm the decision of the trial court and to approve all three bases of that decision (R. 293). These factors, Continental submits, are sufficient to show a non-federal ground for the decision below, fatal to jurisdiction in this court.

It is "the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [Supreme Court] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210. See also *Murdock v. Memphis*, 20 Wall. 590, 636; *People ex rel. Doyle v. Atwell*, 261 U.S. 590, 592.

"The reason [for the rule] is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is

to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-6.

This rule is so firmly established that it has been applied even when the state court adopts a construction of a state statute (state ground) on rehearing to avoid the conflict with the federal constitution (federal ground) which the court had found to exist in its original decision. *Quong Ham Wah Co. v. Industrial Accident Commission*, 255 U.S. 445. Petitioners cannot sustain the jurisdictional burden of demonstrating that this ground cannot account for the decision below. *Durley v. Mayo*, 351 U.S. 277, 281. Nor can it be argued that the state ground was arbitrary² and invoked as "a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrig. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164. See also *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455-458.

If, as construed by the courts below, the Colorado Act does not confer jurisdiction upon the Commission over Continental's flight crew personnel, this Court lacks jurisdiction because the construction to be placed upon a state statute is one of state, not federal, law. Since the decision below is based upon an adequate and independent state ground, it should not be reviewed.

²It should be noted that the Colorado Act is a general statute and does not, in specific terms, purport to apply to the flight crew personnel of interstate air carriers. Therefore, an interpretation of that Act by the state court that it does not apply to such personnel is clearly permissible.

II. The Supreme Court of Colorado Correctly Held That Local Regulation of the Type Involved in This Case Is an Impermissible Burden on Commerce.

The general principles governing the distribution of power over interstate commerce and impermissible burdens on such commerce by state or local regulation are well-established and not seriously disputed by petitioners. The power of Congress to regulate interstate commerce is supreme and plenary. The power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than as are prescribed in the constitution." *Gibbons v. Ogden*, 9 Wheat. 1, 196. In the absence of federal legislation regulating a particular area of interstate commerce, the states may legislate on matters of overriding local concern if the state legislation does not interfere with the operation of such commerce. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299. However, "[i]t has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive" and the states may not act even in the absence of congressional action. *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U.S. 352, 399. Finally, the legitimate interests of the federal government and local governments will be balanced in a determination of the validity of local legislation as measured against the Commerce Clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761. In such a balancing of interests, among the most important factors to be considered are the type and nature of the interstate commerce involved and the degree of existing federal regulation of such commerce.

In measuring the validity of the state regulation asserted in this case, it will be useful first to point out what is not here involved. (1) The policy of the State of Colorado to prevent racial and religious discrimination in all its forms is of long standing.³ (2) Neither the fact of the state policy nor the worth of its purpose is disputed by Continental. (3) The non-discriminatory employment policy embraced in the Colorado Act is wholly consistent with Continental's established personnel policy, which is that applicants for employment will be considered solely on the basis of fitness and ability to do the work (Pet. Ex. 9, R. 79, 178-179). (4) Continental has not challenged the authority of Colorado under its police powers, to enact fair employment legislation, nor to apply such legislation to employees of interstate employers generally. (5) Continental has, and does, contend that the flight crew members who operate its interstate aircraft are a unique group, already subject to all-embracing federal control, whose regulation must be national in scope and uniform in application. Thus properly viewed, the issue is whether Colorado's interest in applying its statute to a limited group of pilots outweighs the national concern for uniform regulation of a class of professional employees having peculiarly national responsibilities.

In addition to the operating regulations of general application to air carriers, discussed *infra*, pp. 35-37, Congress has expressly recognized the singular responsibility

³Colorado's Equal Accommodation Statute, 1953 Colo. Rev. Stat. § 25-1-1 et seq., was first enacted in 1895. In **Colorado Anti-Discrimination Commission v. Case**, No. 19988, Colo. Sup. Ct., Dec. 17, 1962, the Colorado court, in sustaining the constitutionality of the Colorado Fair Housing Act of 1959, 1953 Colo. Rev. Stat. § 69-7-1 et seq. (1960 Perm. Supp.), said: "We hold that as an unenumerated inalienable right a man has the right to acquire one of the necessities of life, a home for himself and those dependent upon him, unfettered by discrimination against him on account of his race, creed or color."

of air carrier pilots by enacting legislation pertaining solely to such persons. These statutes, and implementing regulations, effectively subject commercial airline pilots to distinctive federal regulation and control of the greatest pervasiveness.

Under the Civil Aeronautics Act of 1938, 52 Stat. 977 (1938), as amended, 49 U.S.C. §§ 401-722 (1952),⁴ the Administrator is authorized to issue airman certificates for various aircraft positions to persons meeting prescribed qualifications (§ 602, 49 U.S.C. § 552 (1952)) and to designate specially pilots serving in scheduled air transportation (§ 602(c), 49 U.S.C. § 552(c) (1952)). Pursuant to the statutory grant, comprehensive regulations have been adopted prescribing and limiting the qualifications of pilots generally and airline pilots in particular. The requirements for a commercial pilot's license are contained in 14 C.F.R., Part 20, which establishes a minimum age (§ 20.40), physical standards (§ 20.42), examinations based on the principles of meteorology, navigation, safe flight operations and the civil air regulations (§ 20.43), minimum aeronautical experience (§ 20.44), and demonstrated aeronautical skills (§ 20.45). Additional requirements are imposed for aircraft class ratings (§§ 20.120-20.121-2) and instrument ratings (§§ 20.125-20.128-1). More stringent qualifications as to age, physical condition, aeronautical experience, knowledge and skill are required of candidates for an airline transport pilot rating (14 C.F.R., Part 21, § 21.1 et seq.), and it is necessary that the pilot in command of any commercial aircraft hold an airline transport

⁴The Civil Aeronautics Act of 1938 was replaced by the Federal Aviation Act of 1958, 72 Stat. 737 (1958), as amended, 49 U.S.C. §§ 1301-1542 (1958). However, the instant case was commenced, and the acts upon which it is based occurred, in 1957 and hence the Civil Aeronautics Act of 1938 is the applicable statute here.

pilot rating (14 C.F.R., Part 40, § 40.300). Each air carrier is obligated to establish and maintain a training program for its flight crews, the general nature and minimum standards of such program being prescribed by the Administrator (§ 40.280 et seq.). The composition and qualifications of air carrier flight crews⁵ are federally regulated (§ 40.261; § 40.300 et seq.) as are permissible flight times for airline crews (§ 40.320).

Continental submits that no other aspect of interstate commerce is subject to such broad and comprehensive federal regulation. Even the operating personnel of other interstate transportation companies are not subject to the degree of federal regulation applicable to flight crews of air carriers. By way of contrast, the federal government does not license the operators of interstate motor carriers (49 Stat. 543 (1935), as amended, 49 U.S.C. § 301 et seq. (1958)) or rail carriers (24 Stat. 379 (1887), as amended, 49 U.S.C. § 1 et seq. (1958)). Such licensing as may be deemed necessary is left to the states. The reason for this distinction is clear. No other group connected with interstate commerce has the awesome responsibilities of cockpit crews. No other group must possess such high qualifications, both mental and physical. No other group needs comparable training and experience. No other group operates the interstate carriers for a way of travel which quickly escapes the bounds of local regulative competence [and therefore calls] for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled com-

⁵14 C.F.R., Part 40, Scheduled Interstate Air Carrier Certification and Operation Rules, § 40.5, Definitions. "Flight Crew Member. A flight crew member is a crew member assigned to duty on an airplane as a pilot or flight engineer."

merce of the past." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 107. In short, the cockpit crews of interstate air carriers "require a general system of uniformity of regulation" if any aspect of interstate commerce does. The holdings of this Court teach that certain fields do require a single uniform system and that in these fields the power of Congress is supreme and exclusive. *Minnesota Rate Cases*, 230 U.S. 352; *Southern Pacific Co. v. Arizona*, 325 U.S. 761.

Petitioners attempt to narrow the operative facts by stressing that Green is a mere applicant for employment and emphasizing Colorado's interest in the subject matter of this litigation.⁶ This analysis overlooks the inevitable result of granting the relief sought by petitioners, namely, immediate cockpit crew status for Green. It is this crew status which the federal government has regulated and controlled to an extent unparalleled for any other group related to interstate commerce. Of even greater significance, the Colorado Act does not purport to cover only job applicants. By its terms, it operates in favor of employees—to their promotion, demotion and discharge (§ 80-24-6(2)). It prohibits discrimination in the rate of compensation to employees (§ 80-24-6(2)). The Colorado Commission may order the reinstatement or upgrading of employees (§ 80-24-7(12)). The Colorado Act does not concern itself solely or even primarily with job applicants. It purports to operate upon the whole employment relationship. It is this total employment relationship of the

⁶As a practical matter, Colorado's interest in this matter is minimal. Green, a resident of Michigan (R. 223), obtained a Continental employment application form in San Francisco (R. 35). While Continental's principal offices are presently located in Denver (they will be moved to Los Angeles in mid-1963), it is a Nevada corporation and the majority of its pilots were, at the time of the hearing before the Commission, domiciled in Texas (R. 109).

cockpit crews of interstate air carriers which is, and must be, subject to a single, uniform national rule.

This Court has held that non-federal regulation of interstate carriers with respect to racial matters is an impermissible burden on commerce. *Morgan v. Virginia*, 328 U.S. 373; *Hall v. DeCuir*, 95 U.S. 485. In *Hall* this Court unanimously held that a state statute which prohibited racial discrimination against passengers by an interstate carrier imposed an impermissible burden on commerce and hence was unconstitutional. In *Morgan* it was held that a state statute which required segregated passenger accommodations must fall for the same reason.

Petitioners attempt to avoid the *Hall-Morgan* doctrine by arguing that the state law invalidated in *Hall* prohibited discrimination against interstate passengers whereas the Colorado law, as petitioners would apply it, prohibits discrimination against interstate air carrier cockpit crew personnel. Continental submits that there is more reason to apply the *Hall-Morgan* doctrine to cockpit crews than to interstate bus or steamship passengers. The state statutes invalidated by this Court as burdens on commerce in *Hall* and *Morgan* required at most a shifting of passengers at a state line. The Colorado Act, and others like it, go far beyond and purport to regulate the entire employment relationship. Different substantive requirements, procedural requirements, and enforcement attitudes and methods are almost unlimited in number. Personnel on state commissions and on the staffs of such commissions will vary from year to year and from state to state. Only a hodgepodge of individual attitudes on policy, conciliation and enforcement can result. The law in State X today can be amended in all or any particulars tomorrow;

what may be uniform now, or at least not antagonistic, can be the subject of great diversity next year, depending upon the political complexion, social awareness, or economic attitudes of the various state legislatures. It is not idle to suggest that the scope and enforcement of a given state statute depends as much on the annual or biennial appropriation for the enforcing agency as any other factor, and no factor is subject to greater fluctuation by states or by years.

Moreover, the application of burdensome state legislation to interstate passengers, as in *Hall* and *Morgan*, can hardly be deemed of coordinate significance as applied to those persons who physically operate interstate carriers. If commerce is impeded by diversity of regulation with respect to passengers, the same regulation must create a substantially greater burden when it affects the carrier operator—in this case its pilot. Finally, the speed and complexity of modern air transportation, coupled with its regular, numerous and routine interstate contacts, renders the cockpit crews of air carriers much less subject to permissible diverse state and local regulation than could be applied with respect to the older and more leisurely forms of surface transportation involved in *Hall* and *Morgan*. Cf., *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. at 107.

The present record contains a dramatic illustration of the reason why regulation of air carrier flight crews must be lodged exclusively in the administrative tribunals created by Congress for this purpose. It is no reflection on the seven members of the Colorado Commission to note that they serve without compensation (1953 Colo. Rev. Stat. § 80-24-4 (1960 Perm. Supp.)) and that no one of

them has been represented as having special aptitude in evaluating pilot qualifications. Yet in the instant matter this doubtless well-intentioned group of lay citizens undertook to find, not just that Green was qualified to serve as a member of a flight crew, but that he was "*better qualified*" (emphasis supplied) than any other applicant interviewed (R. 225).⁷ Such a finding presumably would not only have required Continental to employ Green, but to have employed him first among the six qualified applicants interviewed at the same time. And if the authority of the Commission to make qualitative pre-employment determinations in this highly specialized field is sustained, can it successfully be urged that the Commission could not make the same kind of evaluation in the case of a minority group pilot who is denied promotion, or is demoted, or discharged? Under the Colorado Act the authority of the Commission is the same in each instance. Surely the competence of the Commission to pass judgment upon the qualifications of a salesman, or an office worker, or a factory employee, is not co-extensive with its ability to rate an airline pilot. More significantly, an error of judgment by the Commission in the former cases has scarcely the same ramifications as in the case of pilot personnel.

Petitioners do not ask that *Hall* and *Morgan* be overruled. In fact, they specifically approve the side of the coin represented by *Morgan*. The principal attack by petitioners on the applicability of *Hall* to this case is two-fold. First, it is argued that *Hall* is outside the mainstream of constitutional doctrine and has not received the

⁷Continental acknowledged that Green met the minimum qualifications for entry into its pilot training classes. He was so classified until his application was withdrawn after his involvement in multiple litigation became known. Contrary to the apparent basis for the Commission's finding, however, a pilot with the greatest number of flying hours is not necessarily the best qualified pilot (R. 99).

recent approval of this Court. Second, it is urged that changing constitutional doctrine has rendered the *Hall* decision unwise and it should not be applied to this case. Neither contention is sound.

In *Morgan* there were two attacks upon the constitutionality of the Virginia statute compelling racial segregation of interstate bus passengers. This Court rested its decision invalidating the statute upon the burden on commerce ground, and specifically upon the rule of *Hall* that such commerce must be free from the diverse racial regulations of the states. The "soundness of this Court's early conclusion in *Hall v. DeCuir*" was expressly affirmed. 328 U.S. at 383. This Court pointed out in *Morgan* that the state statute in *Hall* was invalidated "for reasons well stated in the words of Mr. Chief Justice Waite." 328 U.S.

*The language of Mr. Chief Justice Waite was then set forth as follows in a footnote on the *Morgan* opinion:

"It was to meet just such a case that the commercial clause in the Constitution was adopted. The river Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight, regardless of the interests of others. Nay more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if, on one side of a State line, his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by State lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board would be compelled to carry all, white and colored, in the same cabin during

at 383-384. Specifically, the Virginia statute in *Morgan* was invalidated⁸ because of "the need for national uniformity in the regulations for interstate travel." 328 U.S. at 386. Mr. Justice Frankfurter, concurring, also found *Hall* to be controlling:

"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall v. DeCuir*, 95 U.S. 485, 24 L. Ed. 547, is controlling. Since it was decided nearly seventy years ago, that case on several occasions has been approvingly cited and has never been questioned. Chiefly for this reason I concur in the opinion of the Court.

"The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, whether such contradictory and confusing State laws concern racial comingling or racial segregation." 328 U.S. at 388.

It would be difficult to find a more express approval of a case than that which was accorded *Hall* in *Morgan*. Moreover, the continuing vitality of *Hall* was recognized by this Court as late as 1960,⁹ subsequent to the cases petitioners rely upon as evidencing changed constitutional doctrine. On previous occasions this Court has often cited and relied to varying degrees upon *Hall*. See, e.g., *Southwestern Pacific Co. v. Arizona*, 325 U.S. 761, 768; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 310;

*(Continued)

his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color." 95 U.S. at 489.

⁹"But a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary. *Hall v. DeCuir*, 95 U.S. 485; . . . " **Huron Portland Cement Co. v. Detroit**, 362 U.S. 440, 444.

Minnesota Rate Cases, 230 U.S. 352, 401; *Cleveland, C. C. & S. L. Ry. v. Illinois*, 177 U.S. 514, 518, 522; *Western Union Telegraph Co. v. Pendleton*, 122 U.S. 347, 357. Other federal courts have relied upon the *Hall-Morgan* doctrine in recent years to invalidate as impermissible burdens on commerce various private rules and state and local regulations of interstate carriers with respect to racial matters. *Chance v. Lambeth*, 186 F.2d 879 (4th Cir. 1951), cert. denied, 341 U.S. 941; *Charles v. Norfolk & Western Railway Co.*, 188 F.2d 691 (7th Cir. 1951), cert. denied, 342 U.S. 831; *Whiteside v. Southern Bus Lines, Inc.*, 177 F.2d 949 (6th Cir. 1949); *Williams v. Carolina Coach Co.*, 111 F. Supp. 329 (E.D. Va. 1952), aff'd, 207 F.2d 408 (4th Cir. 1953); *Pryce v. Swedish-American Lines*, 30 F. Supp. 371 (S.D.N.Y. 1939).

Petitioners rely heavily upon *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, to discredit the *Hall* case. *Bob-Lo*, however, in no sense restricts the *Hall-Morgan* doctrine. If anything, it is one more recent instance of approval of that doctrine by this Court. Before holding that the Commerce Clause did not forbid a conviction under the Michigan Civil Rights Act for denying passage to a Negro on an excursion boat, this Court noted the "special local interest" in the commerce involved¹⁰ and concluded that

¹⁰The factual situation in *Bob-Lo* was indeed unique and bears no relationship to interstate air commerce. A Negro was refused passage on an excursion boat which was operated by defendant company without intermediate stops between Detroit, Michigan, and Bois Blanc Island, a small island in the Detroit River about 15 miles from Detroit. Bois Blanc Island, which was almost entirely owned in fee by defendant and was used by it as an amusement park, was technically across the international boundary in Canada. However, there was no access to the island from Canada or in any other way than on defendant's excursion boats. Defendant's vessels carried no freight, mail, or express, and the only passengers were patrons going to the amusement park, who boarded ship at Detroit on round-trip one-day-limit tickets. The opinion does not indicate that defendant held a certificate of public convenience and necessity from any federal agency.

"[i]t would be hard to find a substantial business touching foreign soil of more highly local concern." 333 U.S. at 35. The *Hall-Morgan* doctrine was recognized and distinguished as follows:

"The regulation of traffic along the Mississippi River, such as the Hall Case comprehended, and of interstate motor carriage of passengers by common carriers like that in the Morgan Case, are not factually comparable to this regulation of appellant's highly localized business, and those decisions are not relevant here." 333 U.S. at 39-40.

Continental is not engaged in a highly localized business. Its Boeing 707 and 720B jet aircraft are flown from Los Angeles to Houston in less than three hours and from Kansas City to Chicago in an hour and five minutes. It would be difficult, if not impossible, to specify a job more completely or regularly interstate in nature than that of a flight crew member on a present day certificated air carrier.¹¹

Nor is it sufficient to contend, as petitioners do here, that changing constitutional doctrine epitomized by *Brown v. Board of Education*, 347 U.S. 483, has rendered the *Hall* decision unwise and hence it should not be applied to this

¹¹*Railway Mail Association v. Corsi*, 326 U.S. 88, is inapposite. A state statute barring racial discrimination by a labor union was upheld against the contention that it violated the due process and equal protection clauses of the 14th Amendment and conflicted with the power of Congress to establish and regulate postal service. Application of the questioned statute was limited to "... a purely private organization deriving no financial or other statutory support or recognition from the federal government ..." 326 U.S. at 95. Issues relating to interstate commerce were neither raised nor discussed nor decided.

case. It is argued from the rationale of *Brown*¹² that no state or locality would constitutionally be permitted to pass a law barring Negro cockpit personnel and therefore no direct conflict with the Colorado Act could arise. This is not the issue. There could be and is great diversity of regulation imposed by the various state anti-discrimination statutes. These differences encompass both procedure and substance, and range from the authorization of criminal penalties for discriminatory acts to no effective regulation at all. Some of the differences which now exist are set forth in Appendix A. Six of the eight states in which Continental operates have such statutes. In addition some cities served by Continental, or in which it has offices, have municipal ordinances and agencies purporting to regulate fair employment practices¹³ either directly or through inclusion of non-discrimination clauses in contracts between the municipality and private employers.¹⁴ Not only do differences now exist, but the statutes and ordinances (and the rules and regulations promulgated thereunder) are subject to modification, amendment and repeal by the political entities which enacted or promulgated them.

Lastly, it should be noted that the *Hall-Morgan*

¹²Petitioners would apparently admit that the holding in *Brown* is in no way related to the constitutional issues involved in this case. *Brown* did not involve interstate or foreign commerce, the commerce clause of the Constitution, an assertion that state laws constituted an impermissible burden on interstate commerce, or an assertion that an attempt had been made to apply a state law in an area pre-empted by federal law.

¹³For example, prior to enactment by the California legislature of a statute having statewide application, the City and County of San Francisco had a comprehensive F.E.P.C. ordinance (Ordinance No. 10478, approved July 10, 1957, effective August 9, 1957).

¹⁴Municipal Code of Chicago, Chapter 198.7A; City of Chicago Commission on Human Relations, 211 West Wacker Drive, Chicago 6, Illinois.

doctrine does not stand alone as an example of impermissible state regulation of interstate commerce. This Court has precluded the application of state statutes to interstate transportation in many areas wholly unrelated to matters of race, and often in the complete absence of any federal regulation of the particular aspect of interstate commerce in question. The most recent pronouncement of this Court came in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, wherein it was held that a state statute requiring the use of a contour type of rear fender mudguard on interstate trucks was an impermissible burden on commerce, even though there was no federal regulation of such wheel flaps. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, this Court invalidated under the Commerce Clause the Arizona Train Limit Law which prescribed the maximum number of passenger and freight cars for trains operating in the state. In *South Covington Ry. Co. v. Covington*, 235 U.S. 537, 548, this Court relied expressly upon *Hall v. DeCuir* to invalidate as an impermissible burden on commerce a local ordinance regulating the maximum number of passengers per car and the minimum number of cars required for a street railway company operating between cities in two states. See also *Seaboard Air Line Railway Co. v. Blackwell*, 244 U.S. 310; *Kansas City Southern Ry. v. Kaw Valley Drainage District*, 233 U.S. 75; *Herndon v. Chicago, Rock Island & Pacific Ry.*, 218 U.S. 135; *St. Louis-San Francisco Ry. v. Public Service Commission*, 261 U.S. 369; *Missouri, K. & T. Ry. v. Texas*, 245 U.S. 484; *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404.

In the final analysis, the question is whether Colorado's interest in eliminating discrimination in the employer-employee relationship justifies the creation of an exception to the national policy of uniform regulation with

respect to flight crew personnel. It is not disputed that additional state anti-discrimination statutes are being passed yearly; the number of states having such laws is approaching 25; in the balance of the states such regulation does not exist. At present the air carrier and the Administrator under the Federal Aviation Act, both possessing a high degree of expertise in the field of air commerce, are charged with responsibility in the matter of pilot selection and qualifications. The effect of holding statutes of this type applicable to airline pilots is to vest an additional, non-technical agency with authority to pass judgment upon matters vital to air carrier operations. We respectfully submit that evaluation and control of the qualifications, skills and working conditions of airline flight crews is and must remain free of divergent local regulations, that the policy of both Colorado and the United States to eradicate discrimination based on race or religion is, as to this limited group, best fostered by the application of uniform national rules which, as demonstrated *infra*, are available, and that the Supreme Court of Colorado correctly held that the state regulation involved in this case constituted an impermissible burden on interstate commerce.

III. Pervasive Federal Legislation Precludes State Regulation of the Activity Involved in This Case.

Continental's constitutional attack on the attempted application of the Colorado Act to its flight crew personnel was and is twofold. It contended (a) that state regulation of its flight crews constituted an impermissible burden on commerce without regard to the nature or extent of federal regulation of the subject matter, and (b) that extensive

federal legislation so occupied the field as to exclude local regulatory action.

While the Supreme Court of Colorado expressly approved the trial court's finding and conclusion that the Act would unduly burden Continental's interstate operations, it also affirmed the lower court's holding that application of the Colorado Act to Continental's flight crews was barred by existing federal regulation of this field (R. 292-293). Continental asserts that the rulings of both courts below with respect to federal pre-emption are correct.

The foundation principles applicable to the doctrine of pre-emption are not in serious dispute. Where the subject matter is within the reach of Congress, federal legislation bars antagonistic local action, and if the area is one in which the federal power is paramount, Congress may expressly forbid state legislation. *M'Culloch v. Maryland*, 4 Wheat. 316; *Sinnot v. Davenport*, 22 How. 227.

Far more common are situations in which Congress has not specifically prohibited local action and there is no direct conflict between the federal statutory scheme and attempted state regulation. In each such case the inquiry must be whether Congress intended to sanction local regulation. *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 10. Guide lines for determining in a given case the permissible scope of state action have been recognized and applied by this Court on many occasions and the principal criteria are well established. The intent of Congress to regulate exclusively need not be expressly declared, *New York Central R. Co. v. Winfield*, 244 U.S. 147, but may be implied from the nature of the federal legislation and the subject matter involved. *Napier v. Atlantic Coast Line R.*

Co., 272 U.S. 605; *Bethlehem Steel Co. v. New York Lab. Rel. Bd.*, 330 U.S. 767, 772. Where the scheme of federal legislation is pervasive, it is proper to infer that Congress intended to exclude state action, *Pennsylvania v. Nelson*, 350 U.S. 497, 502; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230. A similar result will obtain where the federal interest in the activity is such that Congress will be assumed to have pre-empted state action, *Rice*, 331 U.S. at 230, *Nelson*, 350 U.S. at 504, and federal occupation will be found where the policies of local governments may produce a result inconsistent with federal regulation, *Rice*, 331 U.S. at 230, *Nelson*, 350 U.S. at 505. Where the subject matter involves a multi-state activity which cannot effectively be regulated by competing states, the states have been barred from regulation, *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148, 167; *Nelson*, 350 U.S. at 508-509, and the fact that local legislation may complement, rather than conflict with federal legislation, will not save the former, *Charleston and W. C. R. Co. v. Varnville Furniture Co.*, 237 U.S. 597¹⁵; *Missouri Pacific R. Co. v. Porter*, 273 U.S. 341; *H. P. Hood and Sons, Inc., v. DuMond*, 336 U.S. 525, 544; *Campbell v. Hussey*, 368 U.S. 297, 302.¹⁶

¹⁵"When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." 237 U.S. at 604.

¹⁶The doctrine of federal pre-emption often has been applied to the regulation of labor relations in businesses affecting commerce, e.g., *Garner v. Teamsters*, 346 U.S. 485; *Weber v. Anheuser-Busch*, 348 U.S. 468; *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (pre-emption found despite refusal of federal agency to act); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (conduct potentially subject to federal regulation prevents assertion of state jurisdiction); cf., *Chas. Dowd Box Co. v. Courtney*, 368 U.S. 502; *Local 174 v. Lucas Flour Co.*, 369 U.S. 95; and *Smith v. Evening News Ass'n*, 83 S. Ct. 267 (1962), where § 301 of the Labor-Management Relations Act was held expressly to invest state courts with concurrent judicial jurisdiction in actions brought under that statutory provision, although requiring, in the interest of uniformity, that federal, rather than local law, be applied by the state courts when exercising such concurrent jurisdiction. *Local 174 v. Lucas Flour Co.* *supra*.

An examination of the pertinent statutes discloses the all-encompassing scope of federal regulation of Continental's operations as an interstate carrier by air. Such regulation is divided into two major categories: (a) regulation with respect to economic matters, and (b) regulation of flight operations. The Civil Aeronautics Act, 52 Stat. 977 (1938), 49 U.S.C. §§ 401-722 (1952) (applicable to the facts of this case, as noted *supra*, fn. 4, but now superseded by the substantially similar Federal Aviation Act of 1958, 72 Stat. 737 (1958), 49 U.S.C. §§ 1301-1542 (1958)), governs virtually every facet of Continental's corporate activity and regulates in detail its various operations. The economic regulation of air carriers pursuant to that statute is comprehensive. For example, Continental may operate as an air carrier only upon issuance by the Civil Aeronautics Board (CAB) of an authorizing certificate (§ 401(a), 49 U.S.C. § 481(a) (1952)), the predicate for such certification being (a) Continental's ability properly to perform air transportation and (b) a finding that Continental's transportation services are required by the public convenience and necessity (§ 401(d)(1), 49 U.S.C. § 481(d)(1) (1952)). Transportation service may be furnished only to points specified in such certificate (§ 401(f), 49 U.S.C. § 481(f) (1952)), and no segment of Continental's certificated route may be abandoned without CAB approval (§ 401(k), 49 U.S.C. § 481(k) (1952)). Such certificate may be transferred only with CAB approval (§ 401(i), 49 U.S.C. § 481(i) (1952)), and is, after notice and hearing, subject to alteration, amendment, suspension or revocation at any time for intentional failure to comply with the provisions of the Act or any order, rule or regulation issued thereunder (§ 401(h), 49 U.S.C. § 481(h) (1952)). Continental must file, post and publish its tariffs, or any tariff

changes, which may be rejected (§ 403(a), 49 U.S.C. § 483(a)(1952)) or otherwise varied (§ 1002, 49 U.S.C. § 642 (1952)) by the CAB, and it may be required to transport United States mail at prescribed rates and pursuant to rules and regulations issued by the Postmaster General (§§ 401(m),(n), 405, 406, 49 U.S.C. §§ 481 (m),(n), 485, 486 (1952)). Continental may be required to make and file with the CAB regular or special reports on virtually any aspect of its activities (§ 407(a), 49 U.S.C. § 487(a) (1952)), must regularly report certain details of its stock ownership (§ 407(b),(c), 49 U.S.C. § 487(b),(c)(1952)), must maintain its business records in the manner and on the forms prescribed by the CAB, and is subject to CAB inspection and examination of its records, property and equipment at all times (§ 407(d),(e), 49 U.S.C. § 487(d), (e)(1952)). Any consolidation, merger or acquisition of control in another air carrier is carefully regulated and subject to CAB approval (§ 408, 49 U.S.C. § 488(1952)); and interlocking directorships and similar relationships are subject to Board scrutiny and control (§ 409, 49 U.S.C. § 489 (1952)). In addition, and pursuant to statutory mandate, supplementing administrative regulations from time to time have been promulgated in the field of air carrier economic regulation. See, in particular, 14 C.F.R., Parts 200-300.

Federal regulation of the flight operations of Continental and other interstate air carriers is even broader in scope. Continental's aircraft, its use of the airways, the qualifications and abilities of its pilots, and its relationship with its employees generally are subject to close and continuing federal control. The magnitude and detail of such federal regulation emphasizes the Congressional purpose

to promote a uniform, national system of commercial air operations unfettered by diverse or inconsistent local regulation.

The Civil Aeronautics Act imposes broad powers and duties upon the CAB to prescribe minimum standards for the design, construction, performance and maintenance of aircraft and aircraft components, to establish air traffic rules governing the flight of aircraft, and to establish such other rules, regulations and minimum standards as may be necessary to provide for safety in air commerce (§ 601, 49 U.S.C. § 551 (1952)). *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956) and *City of Newark v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (D.N.J. 1958) are illustrative cases recognizing pervasive federal regulation under the Civil Aeronautics Act. The Act imposes upon air carriers the duty of obtaining an air carrier operating certificate which shall specify such terms, conditions and limitations as may be necessary to insure safe operation (§ 604, 49 U.S.C. § 554 (1952)), and makes unlawful any operation by a carrier in violation of its operating certificate (§ 610, 49 U.S.C. § 560 (1952)). Detailed rules and regulations have been adopted to implement the statutory provisions noted above. 14 C.F.R., Parts 1-60. Such rules and regulations govern virtually every aspect of Continental's flight operations.

The statutory provisions and Civil Air Regulations prescribing standards and qualifying conditions for airline pilots have been enumerated in some detail, *supra*, p. 20 and will not be repeated here. Such provisions evidence a Congressional recognition of the need for a uniform national regulatory scheme applicable to interstate air

carriers and their flight crews.¹⁷ Judicial interpretation of these statutes has accorded them, and regulations issued thereunder, the broad application intended by Congress. *Carey v. CAB*, 275 F.2d 518 (1st Cir. 1960) (Lack of skill and judgment on a single flight justified revocation of pilot's airline transport rating); *Hard v. CAB*, 248 F.2d 761 (7th Cir. 1957), *cert. denied*, 355 U.S. 960 (Suspension of pilot's airline transport rating upheld on basis of single incident, even though no rule or regulation had been violated and there was no finding the pilot was not qualified); *Wilson v. CAB*, 244 F.2d 773 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 870 (Suspension of pilot's airman certificate affirmed despite absence of finding pilot not qualified); *Air Line Pilots Association, International v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (Administrative regulation prohibiting use on air carriers of pilots 60 years of age or over upheld); *Kent v. CAB*, 204 F.2d 263 (2d Cir. 1953), *cert. denied*, 346 U.S. 826 (Jurisdiction of CAB to make and enforce labor protective provisions in order approving acquisition of one air carrier by another, such enforcement to include displacement of seniority rights which had vested under pre-existing collective bargaining contracts, affirmed).

The issue in this suit is not, as asserted by petitioners, whether the Colorado Anti-Discrimination Act may in a general sense be applied to employers engaged in interstate commerce (Green's Brief, p.3), but rather, whether the Act may constitutionally be applied to the flight crew personnel of an interstate air carrier (R. 285, 293). Re-

¹⁷The pre-eminence of federal control of aviation was given statutory recognition by the State of Colorado in 1937 (1953 Colo. Rev. Stat. §§ 5-1-2, 5-1-3, and 5-1-8), a fact relied upon in this case by the Denver District Court (R. 258-259) and the Supreme Court of Colorado (R. 290).

ardless of the extent to which federal regulation may exist with regard to other forms of interstate carriage, or to interstate enterprises generally, it is abundantly clear that Congress has exercised such a close and continuing control over the flight crews of air carriers as to manifest an intent to occupy exclusively such regulatory field.¹⁸

In this case federal occupation is apparent from the over-all scope and purpose of the Civil Aeronautics Act. In addition, however, the Railway Labor Act and particular provisions in the Civil Aeronautics Act deal specifically with the question of racial discrimination.

The stated purposes of the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-188 (1958), are (1) to avoid any interruption to commerce or to the operations of any carrier engaged in commerce; (2) to prevent any limitation on the freedom of association among employees or their right to join a labor organization; (3) to provide complete independence for carriers and their employees in the matter of self-organization to carry out the purposes of the act; (4) to provide for the prompt settlement of disputes relating to rates of pay, rules and working conditions, and (5) disputes arising out of grievances or the interpretation or application of agreements entered into under the Act (§ 2, 45 U.S.C. § 151(a) (1958)). Carriers subject to the Act and their employees have a mandatory duty to make and maintain agreements

¹⁸Mr. Justice Jackson's statement in his concurring opinion in *Northwest Airlines, Inc. v. State of Minnesota*, 322 U.S. 292, 303, is apropos:

"Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certificated personnel and under an intricate system of federal commands."

with respect to rates of pay, rules, and working conditions and to adjust all disputes connected therewith (§ 2, First, 45 U.S.C. § 152, First (1958)), and elaborate procedures are established regulating the relationship between a carrier and its employees.

It is significant that no express language in the Railway Labor Act refers to racial discrimination by either carriers, employees, or representatives of employees. Notwithstanding the absence of explicit statutory direction, this Court, in a series of landmark decisions, held that the bargaining representative of a class or craft of carrier employees was bound to represent fairly all employees in that class or craft without discrimination based on race. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham v. Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. The Court found, in the language and purposes of the Railway Labor Act, an intention by Congress to prohibit invidious racial distinctions. The rationale of these cases is that the bargaining representative, having derived its authority from the statute and acting pursuant to certification from the National Mediation Board, an agency of the federal government, was subject to limitations akin to those applicable to government agencies.

The same rationale is applicable to the racial practices of carriers. As demonstrated above, air carriers derive their rights, privileges and duties from federal statutes, are operated pursuant to federal certification, and are regulated in every material respect by federal officers. If labor organizations representing carrier employees are required, by virtue of their statutory sponsorship, to avoid discrimination based on race in their practices, no lesser

obligation can or should be found with respect to carriers. Cf. *Baldwin v. Morgan*, 287 F.2d 750, 755 (5th Cir. 1961). Indeed, this Court has indicated that the true scope of the non-discrimination doctrine enunciated in *Steele* and *Tunstall* extends substantially beyond the narrow construction ascribed to those cases by petitioners. *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, concerned racial discrimination directed, not against members of the class or craft represented by the union, but against a separately represented class of employees. It was held that racial discrimination by a Railway Labor Act bargaining representative, whether directed against members of the represented class or another class, was barred. Of greater significance in the instant case was this Court's direction to the district court, on remand, to enjoin *the carrier* as well as the labor organization from using the collective bargaining contract or any other similar discriminatory device to eliminate the jobs of Negro porters. 343 U.S. at 775. It seems clear on principle that if, as in *Howard*, a carrier is barred by the Railway Labor Act from discrimination against its Negro employees in concert with a labor organization, the same conduct would not be insulated from the reach of the statute simply because the carrier acted unilaterally. See, *Richardson v. Texas and New Orleans R. Co.*, 242 F.2d 230 (5th Cir. 1957).

Petitioners urge, however, that federal pre-emption with respect to racial discrimination by an air carrier, at least as raised in this case, is not disclosed by the Railway Labor Act because the ambit of that statute does not reach applicants for employment, as distinguished from employees. On the contrary, the Railway Labor Act does in fact extend to the employment of new personnel as well as relationships with persons already employed and their

bargaining agents. It prohibits "yellow dog" contracts as a condition of employment (§ 2, Fifth, 45 U.S.C. § 152, Fifth (1958)). It prohibits carriers from influencing, coercing, or interfering with employees in the choice of their bargaining representatives (§ 2, Third, 45 U.S.C. § 152, Third (1958)). A well-known device to effect such coercion is to hire only non-union personnel. Anti-union discrimination in hiring practices is thus effectively proscribed. The Railway Labor Act, therefore, clearly applies to hiring practices of air carriers, and in performing their rights and duties in this area, such carriers, under *Howard*, cannot discriminate on account of race.

Moreover, petitioners' contention ignores the fact that the Colorado Act is not limited in its scope to applicants for employment, but is intended to have continuous application throughout the employment relationship. By purporting to regulate discrimination in hiring, promotion (as in *Steele, Tunstall and Graham*), demotion (as in *Steele, Tunstall and Graham*), discharge (as in *Howard*), and compensation (as in *Steele, Tunstall and Graham*), 1953 Colo. Rev. Stat. § 80-24-6(2) (1960 Perm. Supp.), the Colorado Act intrudes into areas indisputably subject to provisions of the Railway Labor Act. There is no rational basis for such diversity of regulation. A carrier has a duty imposed by statute to make and maintain agreements with representatives of its employees. It is forbidden, on pain of damages, in addition to equitable relief, from entering into or participating in the enforcement of discriminatory agreements. If the Railway Labor Act bars a carrier from discriminating on the basis of race against its employees in matters of promotion, demotion, discharge or seniority rights, whether singly or in collusion with or coerced by a bargaining representative, such bar must

extend to applicants, as well as employees. Any other result would largely nullify the protection from racial bias that Congress intended the Railway Labor Act to confer. See, *Central of Georgia R. Co. v. Jones*, 229 F.2d 648 (5th Cir. 1956), *cert. denied*, 352 U.S. 848; *Richardson v. Texas and New Orleans R. Co.*, 242 F.2d 230 (5th Cir. 1957).

The Congressional intent to pre-empt the field of regulation with respect to air carrier flight crews is even more readily discerned in the Civil Aeronautics Act, which contains an express prohibition against discrimination of all kinds and a statutory remedy for aggrieved persons.¹⁹ That statute's declaration of policy, 52 Stat. 980 (1938), 49 U.S.C. § 402 (1952), requires the Civil Aeronautics Board to consider, as being in the public interest:

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;"

and § 404(b) of the C.A.A., 52 Stat. 993 (1938), 49 U.S.C. § 484 (b) (1952), affirmatively bans an air carrier from unjust discrimination or unreasonable prejudice "in any respect whatsoever."²⁰ A substantially identical statute²¹

¹⁹Nor does § 1106 of the Civil Aeronautics Act, 52 Stat. 1027 (1938), 49 U.S.C. § 676 (1952), alter the above result. That clause merely preserves **existing remedies**, in the sense of pre-existing remedies. See *Mack v. Eastern Air Lines*, 87 F. Supp. 113, 115 (D. Mass. 1949). As all the incidents giving rise to the present litigation took place in 1957, the applicable statute is the Civil Aeronautics Act of 1938. The Colorado Anti-Discrimination Act not having been passed until 1957, that statute was not a "now existing remedy" within the meaning of § 1106 when the 1938 Act was passed and therefore cannot be used to supplement the federal legislation.

²⁰Section 404(b) of the Civil Aeronautics Act (52 Stat. 993 (1938), 49 U.S.C. § 484(b)(1952) provides:

"(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation

was held in *Mitchell v. U. S.*, 313 U.S. 80, to forbid discrimination based on race in the accommodations made available to interstate rail passengers. *Henderson v. U. S.*, 339 U.S. 816, held that § 3(1) of the Interstate Commerce Act prohibited segregated dining facilities on interstate trains. *Boynton v. Virginia*, 364 U.S. 454, involved similar statutory language applicable to interstate motor carriers.²² A Negro interstate bus passenger refused to leave the portion of a bus terminal dining room reserved for white persons. His state court conviction was set aside because of the anti-discrimination provisions of §216(d), notwithstanding that the bus company neither owned nor directly controlled the terminal restaurant.

²⁰ (Continued)

in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

²¹Section 3(1) of the Interstate Commerce Act (54 Stat. 902 (1940), 49 U.S.C. § 3(1) (1958)), which provided:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

²²Section 216(d) of Part II, Interstate Commerce Act (54 Stat. 924 (1940), 49 U.S.C. § 316 (d) (1958)) provides in part as follows:

"... It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, that this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

As the foregoing and related cases recognize, one of the purposes of § 3(1) and § 216(d) of the Interstate Commerce Act is to prohibit racial discrimination by interstate rail and motor vehicle carriers. The same beneficent purpose must be accorded similar language contained in § 404(b) of the Civil Aeronautics Act.²³ Although the precise issue has not been presented to this Court, the Court of Appeals for the Second Circuit, in *Fitzgerald v. Pan American Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956), had no hesitation in construing § 404(b) as prohibiting racial discrimination by an air carrier and as creating an independent federal right of action in favor of persons aggrieved thereunder.

In determining whether local regulation may stand in a field in which there has been extensive and expanding federal activity, it is pertinent to inquire whether a federal remedy is available to aggrieved persons. *Fitzgerald v. Pan American Airways, Inc.*, *supra*, held that redress in damages may, in appropriate cases, be claimed for violation of § 404(b). There is, however, a statutory procedure under which equally effective remedies may be fashioned in cases of the type here under consideration.²⁴

Section 1002 of the Civil Aeronautics Act (49 U.S.C. § 642 (1952)) permits any person, believing the Act to have been violated, to file a complaint with the Civil Aero-

²³ It is noteworthy that the Department of Justice and certain of the amici curiae have declined to take a position on the issue of whether § 404(b) prohibits air carriers from racial discrimination in matters of employment.

²⁴ In discussing various available remedies under federal law, Continental in no sense admits discrimination against Green on account of his race. Its comments here are directed solely to the issue of whether local regulation of the subject matter of this case is permissible.

nautics Board. The CAB may also, on its own motion, initiate investigations of suspected violations (§ 1002(b), 49 U.S.C. § 642(b)(1952)). If, after notice and hearing, the CAB determines that any provision or requirement of the Act has been violated, it may issue an order requiring compliance (§ 1002(c), 49 U.S.C. § 642(c)(1952)). A procedure for conducting hearings before either the CAB or duly designated hearing examiners, compelling the attendance of witnesses, and the production of documents is provided (§§ 1004, 1005, 49 U.S.C. §§ 644, 645 (1952)), as is judicial review of orders issued by the Board (§ 1006, 49 U.S.C. § 646 (1952)).²⁵ Section 1007 (49 U.S.C. § 647 (1952)) rounds out the statutory plan by authorizing the CAB or, upon the Civil Aeronautics Board's request and under the direction of the Attorney General, the various United States attorneys, to prosecute actions in the district courts of the United States for the enforcement of the Civil Aeronautics Act.

Increasing use has been made of the counterpart of § 1007 in the Federal Aviation Act of 1958 (§ 1007, 72 Stat. 796 (1958), 49 U.S.C. § 1487 (1958)) to enforce the non-discrimination provisions of § 404(b) (now 72 Stat. 760 (1958), 49 U.S.C. § 1374(b) (1958)).²⁶ In *U. S. v. City of Montgomery*, 201 F. Supp. 590 (M.D. Ala. 1962) the Attorney General of the United States, at the request of the CAB and pursuant to § 1007 of the Federal Aviation Act of 1958, commenced an action directed against segre-

²⁵The Civil Aeronautics Board has been recognized as having wide latitude in fashioning appropriate remedial orders. *Las Vegas Hacienda, Inc., v. Civil Aeronautics Board*, 298 F.2d 430, 439 (9th Cir. 1962), cert. denied, 369 U.S. 885.

²⁶See *Wills v. Trans World Air Lines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961) as an example of the broad remedial scope which has been accorded § 404(b).

gated terminal facilities at the Montgomery airport. The district court held that maintenance of segregated restaurant and other facilities at the air terminal violated both § 404(b) and Article I, § 8 of the United States Constitution. Substantially similar actions have been successfully maintained by the Department of Justice, in each instance at the request of the CAB and the Administrator of the Federal Aviation Act, in *U. S. v. City of Birmingham*, (Civil No. 10196, M.D. Ala., S.D., findings of fact, conclusions of law and judgment entered July 31, 1962, unreported) and *U. S. v. City of Shreveport*, (Civil No. 8888, W. D. La., findings of fact, conclusions of law and decree entered November 2, 1962, notice of appeal filed November 16, 1962, unreported). The significance of these cases, in the present context, is the recognition that racial discrimination in or related to air carriers is barred by § 404(b) and that, in addition to private individuals, the United States may bring an independent action for violation of this statute.

It will thus be seen that under both the Railway Labor Act, as construed by this Court, and the Civil Aeronautics Act, by specific statutory direction, racial discrimination by air carriers has been subjected to extensive federal control. Moreover, discrimination of this type is not only federally regulated but federal remedies of great breadth are provided. As has been shown, federal regulation and control permeates all phases of the business of an air carrier. The intention of Congress to require a consistent and uniform development of air commerce in all its aspects is manifested by the sweep of its regulatory commands.

The fact that the Colorado statute purports, in gen-

eral terms, to regulate in a manner sympathetic to the national policy on racial discrimination is not a valid reason for carving an exception to the paramount national policy requiring uniform regulation and control of flight crews engaged in interstate air commerce. This is particularly true where, as here, the national policy applicable to air carriers, as enacted by Congress and interpreted by the courts, would afford relief to a person who claims and can establish that he has been discriminated against because of his race.

CONCLUSION

Continental submits that this Court should hold that it does not have jurisdiction in view of the independent non-federal basis for the decision of the court below or, in the alternative, that the decision of the Supreme Court of Colorado was correct and should be affirmed.

Respectfully submitted,

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APPENDIX A

Comparison of Some of the Differences Between the Various State Laws Affecting Discrimination in Employment¹

I. *Basic Types of State Acts*

There are at least four basic types of state laws affecting discrimination in employment. The statutes may be grouped broadly as follows:

(a) Statutes which provide for an administrative hearing and judicial enforcement of orders of an administrative agency or official. States in this class are *Alaska, California, Colorado, Connecticut, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin.*

(b) Statutes which do not provide for any type of administrative agency or enforcement of orders, but provide that violation of the statute shall constitute a misdemeanor. States in this class are *Delaware and Idaho.*

(c) Statutes which are strictly voluntary and have no enforcement provisions, civil or penal. States in this class are *Indiana, Nevada and West Virginia.*

(d) Statutes which apply only to a narrowly limited group of employers and do not establish any type of administrative agency. The *Arizona* statute applies only to public employers and to contractors performing work

¹The statutory references to the various state laws affecting discrimination in employment are set forth in **Appendix B, infra.**

under a contract with a public employer. The *Nebraska* statute applies only to employers engaged in the production, manufacture or distribution of naval or military equipment or supplies for the State of Nebraska or the United States. *Nevada* has, in addition to the voluntary statute referred to in (c) above, a separate statute which applies only to public contractors performing work which is to be paid from public funds.

II. *Presence or Absence of a Separate Commission*

Many of the states have established separate commissions to administer their statutes affecting discrimination in employment. However, other states have different arrangements. For example, in *Alaska* the Commissioner of Labor administers the state statute. In *Idaho*, where the statute provides only that its violation is a misdemeanor, no specific duties are imposed on any public official. In *New Jersey*, most of the statutory duties, including the power to hold hearings and issue orders, are vested in the State Commissioner of Education. In *Oregon*, the Commissioner of the Bureau of Labor administers the statute. In *Wisconsin*, the statute is administered by the State Industrial Commission, although there is a seven-member Advisory Committee. The *Arizona* and *Nebraska* statutes applicable only to certain classes of public works contractors do not vest any specific duties in any public official.

III. *Who May File Complaints*

In nearly all states which have a commission-type statute complaints may be filed by any person claiming to be aggrieved by an unlawful discriminatory practice. However, in *Rhode Island* only the Commission can issue

a complaint, following a *charge* to the Commission by an aggrieved person or a civil liberties organization or after a preliminary investigation on the Commission's own initiative. Likewise, in *Ohio* only the Commission issues a complaint, following a charge by an aggrieved person or a preliminary examination by the Commission on its own initiative.

(a) The following states permit complaints only by persons claiming to be aggrieved: *Alaska, Illinois, Michigan* and *Minnesota*.

(b) The following states permit complaints by either an aggrieved person or the state Attorney-General: *California, Kansas, Missouri* and *Oregon*.

(c) The following states permit complaints by the aggrieved person and others as noted:

(1) *Colorado*—Attorney General, the Commission and a Commissioner.

(2) *Connecticut*—The Commission.

(3) *Massachusetts*—Attorney General and the Commission.

(4) *New Jersey*—Attorney General, Commissioner of Labor and Industry, and Commissioner of Education.

(5) *New Mexico*—Attorney General and the Industrial Commissioner.

(6) *New York*—Attorney General and the Industrial Commissioner.

(7) *Pennsylvania*—Attorney General and the Commission.

(8) *Washington*—The State Board Against Discrimination.

(d) In addition, most of the states permit complaints by employers requesting assistance by conciliation or other remedial action upon allegations that their employees, or some of them, refuse or threaten to refuse to cooperate or comply with the provisions of the statute. States in this class are *Alaska, California, Colorado, Connecticut, Kansas, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, Oregon, Pennsylvania* and *Washington*. In *Colorado* and *Minnesota* labor unions may also file complaints upon similar allegations against their members, or some of them.

IV. *What Practices are Prohibited*

The statutes generally contain prohibitions against discrimination based on race, color, religious creed and national origin, although the specific language used varies.

The following statutes also prohibit discrimination based on age: *Connecticut, Delaware, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Washington* and *Wisconsin*.

The *New Jersey* statute also prohibits discrimination based on eligibility for service in the armed forces of the United States.

The *Wisconsin* statute also prohibits discrimination based on sex. The *Nevada* statute applicable only to public works contractors also prohibits discrimination based on sex.

V. *Statutes of Limitations*

The state statutes vary widely with respect to the statute of limitations applicable to complaints of discriminatory conduct.

The statutes of *Alaska, Idaho, New Mexico, Oregon* and *Wisconsin* have no specific limitation period. Presumably, other provisions of state law govern or complaints may be filed without regard to a limitation period.

In *California* and *Rhode Island* the statute of limitations is one year. In *Colorado, Kansas, Massachusetts, Minnesota, Ohio* and *Washington* the limitation period is 6 months. In *Illinois* it is 120 days. In *Connecticut, Delaware, Michigan, Missouri, New Jersey* and *Pennsylvania* it is 90 days. In *New York* the limitation period is 90 days for complaints by persons claiming to be aggrieved but 6 months for complaints by the Attorney-General or the Industrial Commissioner.

VI. *Definitions of Employers*

Most statutes require that a minimum number of employees be employed before a private employer will be classified subject to the act. *Illinois* requires a minimum of 75 employees (50 after December 31, 1964), *Missouri* requires a minimum of 50, *Pennsylvania* requires 12, *Kansas, Michigan, Minnesota* and *Washington* require 8, *Colorado, Massachusetts, New Jersey, New York* and *Oregon* require 6, *California* and *Connecticut* require 5, *New Mexico, Ohio* and *Rhode Island* require 4. *Alaska, Indiana* and *Wisconsin* do not require any minimum number of employees.

Definitions of employees to be considered in determining whether an employer is subject to the statute also vary. Some states require that the employees work within the state. For example, *Illinois* and *Missouri* require that the 75 and 50 employees, respectively, be employed "with in the State."

VII. *Required Qualifications of Commission Members*

None of the state statutes which establish separate commissions require any affirmative qualifications for members of the various commissions, except that *Minnesota* requires one of its commission of up to 9 members to be an attorney. No educational or experience standards are imposed by the statutes of any other state.

No requirements of any kind for commission members exist in *California*, *Connecticut*, *Massachusetts*, *New Jersey*, *New York*, *Rhode Island* and *Washington*. The following states impose a limitation on the maximum number of members which may belong to the same political party: *Colorado*, *Illinois*, *Indiana*, *Michigan*, *Ohio*, *Pennsylvania* and *West Virginia*. The following states provide for certain geographical or Congressional district representation on the Commission: *Colorado*, *Minnesota* and *West Virginia*. *Kansas* and *Wisconsin* (for its Advisory Committee) provide that a certain number of members shall represent industry and labor, respectively. *Illinois* requires that members have been residents of the state for 5 years. Two members of the *New Mexico* Commission are ex-officio members based upon their other positions (Attorney-General and Commissioner of Labor) in the state government. *Nevada* and *West Virginia* state that the members of the Commission represent the racial, religious and ethnic groups residing in the state.

VIII. *Compensation of Commission Members*

Many of the statutes specifically provide that the members of the commissions are to serve without compensation. States in this group include *Colorado, Illinois, Nevada, New Jersey, New Mexico* and *West Virginia*.

Yearly salaries are paid to the members of the Commission in some states. For example, in *Massachusetts* the Commission chairman receives \$6,000 per year and the other two members \$5,000 per year; in *Ohio* the members receive \$5,000 per annum; in *Rhode Island* the members receive a salary of not more than \$2,500 per year.

Several states give per diem pay for time actually spent by the commissioners in the performance of their duties. The *California* statute provides \$50 per day; *Connecticut, Indiana, Michigan* and *Minnesota* (for Board of Review members) provide \$25 per day; *Washington* provides \$20 per day; and *Kansas* and *Pennsylvania* provide \$15 per day.

IX. *Number of Commission Members*

The number of members of the various Commissions varies from a high of 11, in *Pennsylvania* to a low of 3 in *Massachusetts*. The number of members in some of the other states is as follows: *Connecticut*—10; *West Virginia*—9; *Minnesota*—up to 9; *Colorado, New Jersey* and *New York*—7; *Michigan*—6; *California, Illinois, Indiana, Kansas, Nevada, New Mexico, Ohio, Rhode Island* and *Washington*—5.

X. *Admissibility of Information Received During Conciliation Attempts*

Most of the statutes provide that efforts to eliminate alleged discriminatory practices by persuasion and conciliation shall precede a formal hearing. Future use of information secured during such efforts is subject to varying rules.

Some statutes specifically provide that endeavors at conciliation shall not be received in evidence at the hearing. States in this class include *California, Connecticut, Kansas, Massachusetts, Minnesota, Missouri, New Mexico, New York, Rhode Island* and *Wisconsin*.

The statutes of *Alaska, Oregon, and Wisconsin* contain no limitations upon the use of information secured during efforts at conciliation and presumably such information would be admissible at the formal hearing.

Other state statutes do not specifically provide that endeavors at conciliation shall not be admissible, but they do require that information as to what transpired during conciliation endeavors shall not be disclosed, or shall be disclosed only under prescribed conditions or subject to prescribed limitations. States in this class include *Colorado, Illinois, Michigan, New Jersey, Ohio* and *Pennsylvania*.

XI. *Type of Orders Permitted*

As noted previously, the statutes of *Arizona, Delaware, Idaho, Indiana, Nebraska, Nevada* and *West Virginia* do not contemplate administrative orders.

Most of the other state statutes authorize any orders necessary to effectuate the purposes of the various acts, although the specific statutory language pertaining to orders varies. However, the statutes of *Alaska* and *Oregon* provide for cease and desist orders only.

XII. *Penal Sanctions*

As noted previously, the *exclusive* sanction under the statutes of *Delaware* and *Idaho* is to classify violations of the act as misdemeanors.

A number of the other states provide exclusively for enforcement of administrative orders, including contempt proceedings for violation of a judicial order of enforcement.

A third category of states provides for enforcement of administrative orders *plus* criminal sanctions for willful violation of a commission order. States in this category include *Alaska*, *California*, *Massachusetts*, *Missouri*, *New Jersey*, *New York*, *Oregon*, *Pennsylvania* and *Washington*.

Finally, in those states which have statutes applicable only to certain groups of public works contractors, *Arizona* provides that violation of the statute shall be deemed a breach of the public works contract and a misdemeanor, *Nebraska* provides that violation shall be a misdemeanor, and *Nevada* provides that violation shall be a breach of the contract.

XIII. *Judicial Review*

The provisions for judicial review and enforcement of commission orders vary widely from state to state. In some states, such review is conducted in accordance with other provisions of state law governing administrative procedure and review. The time periods for seeking review or enforcement vary; in some states, review proceedings operate to stay the Commission's order, in other states they do not; the provisions vary concerning the right to introduce additional evidence at the judicial review level.

One of the most notable contrasts is that several states provide for a trial *de novo* at the judicial review level. States in this category include *Alaska*, *Missouri* and *New Mexico*. In *Missouri* any party to the court proceeding is entitled to a trial of the issues by a jury.

APPENDIX B**State Laws Affecting Discrimination in Employment**

ALASKA	Alaska Comp. L. Ann. §§ 43-5-1 through 43-5-10 (1958 Cum. Supp.)
ARIZONA	Ariz. Rev. Stat. §§ 23-371 through 23-375 (1956)
CALIFORNIA	Ann. Calif. Codes, Labor Code §§ 1410 through 1432 (West, 1962 Cum. Supp.)
COLORADO	1953 Colo. Rev. Stat., §§ 80-24-1 through 80-24-8 (1960 Perm. Supp.)
CONNECTICUT	Conn. Gen. Stat. Ann., 1958, §§ 31-122 through 31-128
DELAWARE	Del. Code Ann., ch. 7, subch. II, §§ 710 through 713 (1960 Supp.)
IDAHO	Idaho Gen. L. Ann., ch. 73, §§ 18-7301 through 18-7303 (1961 Supp.)
ILLINOIS	Ill. Ann. Stat., ch. 48, §§ 851 through 866 (Smith-Hurd, 1962 Cum. Supp.)
INDIANA	Ann. Stat. Ind. §§ 40-2307 through 40-2317 (Burns, 1962 Supp.)
KANSAS	Gen. Stat. Kan. §§ 44-1001 through 44-1014 (1961 Supp.)
MASSACHUSETTS	Mass. Gen. L. Ann., 1958, ch. 151B, §§ 1 through 10 (1962 Cum. Supp.)
MICHIGAN	Mich. Stat. Ann. §§ 17.458(1) through 17.458(11) (1960)

MINNESOTA	Minn. Stat. Ann. §§ 363.01 through 363.13, as amended by L. 1961, ch. 428
MISSOURI	Mo. Ann. Stat. §§ 296.010 through 296.070 (Vernon, 1962 Cum. Supp.)
NEBRASKA	Neb. Rev. Stat. §§ 48-215 through 48-216 (1960)
NEVADA	Nev. L. 1961, ch. 364; Nev. Rev. Stat. § 338.125 (1959)
NEW JERSEY	N.J. Stat. Ann. §§ 18:25-1 through 18:25-28 (West, 1962 Cum. Supp.)
NEW MEXICO	N. Mex. Stat. Ann. §§ 59-4-1 through 59-4-14 (1960 Replacement)
NEW YORK	N. Y. Executive Law §§ 290 through 301
OHIO	Ohio Rev. Code Ann. §§ 4112.01 through 4112.08 and 4112.99 (Page, 1962 Supp.)
OREGON	Ore. Rev. Stat. §§ 659.010 through 659.115 and 659.990 (1959-60 Supp.)
PENNSYLVANIA	Pa. Stat. Ann., tit. 43 §§ 951 through 963 (Purdon, 1961 Cum. Supp.)
RHODE ISLAND	R. I. Gen. L. Ann. §§ 28-5-1 through 28-5-39 (1956)
WASHINGTON	Rev. Code Wash. §§ 49.60.010 through 49.60.320 (1962)
WEST VIRGINIA	W. Va. Code, 1961, §§ 265(156) through 265(161)
WISCONSIN	Wisc. Stat. Ann., 1957, §§ 111.31 through 111.37 (West, 1962 Supp.)